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THE WHITE HOUSE
WASHINGTON

2 December 1985

Steve:

Thought you might be interested
in this follow-up from AUL on
S. 1580, the Legal Fees Equity
Act.

Carl

AMERICANS UNITED FOR LIFE

Legal Defense Fund

26 November 1985

Carl Anderson, Esq.
Special Assistant to the President
Office of Public Liaison
The White House
Washington, D.C. 20500

RE: S. 1580 ("Legal Fees Equity Act")

Dear Carl:

Please excuse my delay in getting back to you concerning your letter of August 21, in which you enclosed the text of S. 1580 as introduced by Senator Thurmond.

We are very gratified that this proposal includes, in Sec. 4(d), a prohibition on award of attorneys' fees against private parties who intervene to defend the validity of a law or action of the federal or of a state government.

The text of the measure, we believe, is adequate to prevent the punitive award of fees which has occurred in cases such as Diamond v. Charles and City of Akron v. Akron Center for Reproductive Health.

The accompanying memorandum from the Justice Department, however, does not offer the clearest possible explanation of this provision. In the first place, the memorandum refers to Sec. 4(d) as having two sub-sections, (1) and (2). The text of the statute is not so arranged.

More importantly, the final sentence describing Sec. 4(d) describes intervening defendants as those "whose conduct did not give rise to the controversy". I am concerned that this language could be twisted to permit an attorneys' fee award against a prolife group which first sponsors and lobbies for prolife legislation, and then intervenes to defend that legislation when challenged in court. Such activity could be said to have "given rise to the controversy", even if it does not rise to the level of a violation of plaintiffs' constitutional rights. I understand that the use of the conjunctive "and" in this sentence is intended to prevent such an interpretation. Nevertheless, if the sentence were edited to remove the words "did not give rise to the controversy and" the intent of this provision would be more clear.

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Carl Anderson, Esq.
November 26, 1985
page two

As you can see, this is a relatively minor complaint, and in no way detracts from our great appreciation towards the drafters of S. 1580, the Department of Justice, and Senator Thurmond, for recognizing the gravity of misuse of 42 U.S.C. Sec. 1988 against intervening defendants.

We will follow the progress of S. 1580 with great interest, and of course stand ready to offer any assistance that may be required to preserve the text of Sec. 4 of this proposal.

In case you have not already received them, I have enclosed a copy of our two briefs in the Diamond case.

Thank you very much for your attention to these concerns.
We hope you have an enjoyable holiday season.

Sincerely,

A handwritten signature in dark ink, appearing to be 'Ed' with a stylized flourish.

Edward R. Grant
Executive Director/General Counsel

THE WHITE HOUSE

WASHINGTON

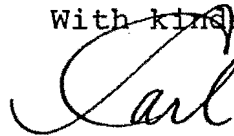
21 August 1985

Dear Ed:

Enclosed is a copy of S. 1580 as introduced by Senator Thurmond on behalf of the Administration. I would appreciate learning your view of section 4 of the bill and the accompanying legal memorandum from the Department of Justice regarding attorneys' fees awards against private party intervening-defendants in civil rights cases.

Please keep in touch in this and other matters.

With kindest regards,



Carl A. Anderson
Special Assistant to the President
Office of Public Liaison

Mr. Edward R. Grant
Executive Director
Americans United for Life
343 S. Dearborn Street
Suite 1804
Chicago, IL 60604

Encl. Cong. Record, Aug. pp S 10876-10896

June 25, 1985

Carl Anderson, Esq.
Office of Public Liaison
The White House
Washington DC 20050

Dear Mr. Anderson:

Thank you for your interest in the issue of attorney's fees awards against private party intervening-defendants in civil rights cases.

This letter and its enclosures are intended to inform you of the current posture of this issue and our proposals for resolution.

The situation concerning attorney's fees awarded against private party intervenors, particularly in cases involving abortion rights, has come to a crisis point. The enclosed opinion of District Judge Charles P. Kocoras reflects this problem acutely. An award of \$100,000 has been entered in this case against AUL and its clients. If this award is upheld on appeal, there is no question of the chilling effect upon those who would otherwise seek leave to intervene in federal court action on behalf of the rights of unborn children, and related interests.

The need for involvement by such private parties is paramount, as one can see from the Charles litigation itself. AUL attorneys took the lead role in defending the Illinois abortion law, preparing the bulk of the motions and briefs, and even arguing the case before the Seventh Circuit. Furthermore, it was AUL alone, not the State of Illinois, that appealed this case to the Supreme Court and successfully obtained a full hearing. Diamond v. Charles, No. 84-1387, Prob. Juris. noted, May 20, 1985.

Clearly, as a non-profit organization, we cannot continue to participate in actions brought under the Civil Rights Act unless the legal issues concerning attorney's fees awards under 42 U.S.C. §1988 are resolved. We are confident that Congress did not intend to permit awards such as that made by Judge Kocoras in Charles, and by Judge Dowd in Akron, 604 F.Supp. 1268, and 604 F.Supp. 1275 (N.D. Ohio, 1985) (enclosed). We therefore believe it is time for Congress to act to correct these mistaken opinions.

AMERICANS UNITED FOR LIFE

Legal Defense Fund

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The Attorney Fees Equity Act, S. 2802, is apparently the Administration's vehicle for resolving a number of issues related to fee awards. During discussions with Randall Rader, Esq., General Counsel to the Senate Judiciary Committee, I have proposed amendments to S. 2802 that would incorporate both findings and restrictive language concerning the award of fees against private party intervenors. This issue has also been discussed with Stephen Galebach, Esq., and Grover Rees, Esq., in the Department of Justice. Our proposals have been set forth in a memorandum dated January 4, 1985, which is enclosed.

What I ask from you is assistance in obtaining information as to the status of S. 2802 and of our proposed amendments. We would prefer to have language on this issue in the bill as it is proposed by the Administration and, presumably, Senator Hatch. If the Administration is inclined to do so, we would make every effort to provide support for such language in order to ease its passage. If the Administration is not so inclined, we need to know this in order to plan an alternative strategy. If no decision has been made on our proposal, we would welcome the opportunity to inform those who will be making that decision of the extent and nature of this problem. In any event, without knowledge as to the status of S. 2802, we cannot move forward on this.

Thank you for your assistance in obtaining for us this information concerning S. 2802. Preserving the ability of organizations such as AUL to participate in civil rights litigation is, I am certain you agree, compatible with the goals of this Administration concerning legal policy.

Very truly yours,

A handwritten signature in cursive script, reading "Edward R. Grant". The signature is written in dark ink and is positioned above the typed name and title.

Edward R. Grant
Executive Director/General Counsel

ERG:VR

MEMORANDUM

TO: Randy Rader, Esq.
Douglas Johnson
Other Interested Parties

FROM: Edward Grant, Executive Director
Americans United for Life Legal Defense Fund

DATE: January 4, 1985

RE: S. 2802 and Attorneys' Fees Assessments Against Pro-Life
Legal Defense Advocates

The vindication of constitutional rights through federal civil rights litigation has been enhanced by the ability of prevailing plaintiffs to recover their reasonable attorneys' fees. 42 U.S.C. §1988 (1976). Where the nature of the constitutional rights requires a balancing of these rights against both competing rights and state interests, the question of which rights/interests ought to be vindicated is not clear-cut. Examples includes abortion rights, religious freedom, separation of church and state, and employment discrimination.

As a result, it has become increasingly necessary for citizens and attorneys, acting in the public interest, to organize legal defense funds quite similar to the legal defense funds which have traditionally represented the interests of civil rights plaintiffs. In order to effectively represent their interests, these defense-oriented advocates frequently intervene in litigation over constitutional rights as defendants on the side of state and federal authorities. Only in this way are such advocates assured of being fully heard before the courts, and only in this way are they able to participate from the onset of litigation in such important aspects as trial strategy and creation of the record. Participation as amicus curiae, even at the district court level, affords no such opportunities.

Unfortunately, several courts have misapplied 42 U.S.C. §1988 to permit the award of attorneys' fees against intervening defendants who wind up on the losing side in constitutional litigation. Such decisions run contrary to the intent of 42 U.S.C. §1988 in at least two important aspects. First, fee awards are intended to be assessed against those parties, usually states, municipalities or those acting under color of state law, that actually violated, or are in a position to violate, the constitutional rights of the plaintiffs. Private parties who intervene as defendants are not in a position to violate plaintiffs' rights; rather, in cases of controversy, they are simply advocates for the interests that must be balanced against plaintiffs' rights. Second, such fee awards tend to discourage the very same type of public interest advocacy that is meant to be encouraged by 42 U.S.C. §1988. Intervening defendants who do not prevail on their claims ought to be treated identically with plaintiffs who do not prevail: fee awards should be limited to those cases where the litigants in question have exhibited bad faith in the conduct of the lawsuit.

The introduction of S.2802, the "Legal Fees Equity Act", presents a compelling opportunity to redress the injustice of attorney fees awards against private intervenors. Indeed, the substance of this much-needed reform is already implied in the Committee Print of the bill, which consistently refers to fee awards as being made against the United States, or against state and local governments. What is suggested in the remainder of this memorandum is draft language to incorporate an explicit prohibition upon the award of attorneys' fees against intervening defendants who are not violators of the constitutional rights of prevailing plaintiffs.

Proposed Amendment to Section 2(a) (page 3)

(9) Contrary to the intent of Congress, awards of attorneys' fees have been made against private parties intervening as defendants to represent constitutional rights and interests in certain civil rights actions. These awards place insurmountable financial burdens upon these private individuals and organizations;

(10) It is inappropriate for awards of attorneys' fees to be made against private party intervening defendants, unless such parties, acting under color of state law, have directly violated the constitutional rights of prevailing plaintiffs. Such awards made under any other circumstances discourage the advocacy of important legal interests and constitutional rights, the same type of advocacy that is sought to be encouraged by the shifting of attorneys' fees to prevailing parties.

Proposed Amendment to Section 2(b) (page 4)

(5) to restrict the award of attorneys' fees against private party intervenors to those parties who are found to have violated the constitutional rights of a prevailing party otherwise entitled to an award of fees, provided that, opposition as a party-defendant to the legal position taken by the prevailing party during constitutional rights litigation is not be considered a violation of the prevailing party's constitutional rights.

Proposed Amendment to Section 4(d) (page 9)

(3) to create any right to an award of attorneys' fees against any party other than the United States, a State, or local governments, or any other party acting under color of state law, in any judicial proceeding.

Proposed Amendment to Section 5 (page 10)

(6) The attorneys' fees are only sought against the United States, or against a State or local government, or against another party acting under color of state law.

This memorandum has been purposefully brief, and thus, does not address all possible questions or objections to the statutory language proposed. It is the author's intention to stimulate discussion of using S. 2802 as a vehicle to resolve a very dangerous problem of judicial application of the attorneys' fees statute. You will note that the approach taken is not "abortion specific"; although we are most keenly aware of the attorneys' fees issue in the context of abortion litigation, fees have been awarded against intervenors in other types of cases.

We welcome suggestions, particularly as to the need for more extensive analysis of the judicial climate that has given rise to this series of proposed amendments to S. 2802.

other civil rights laws using similar operative language, to be given full effect.

Therefore, our legislation would reverse the holding in *Atascadero* by providing that, unless otherwise expressly provided in Federal statute, the remedies available to enforce the four major Federal civil rights laws noted above, and any other Federal civil rights law based on receipt of Federal financial assistance, against public or private entities other than States shall also be available against the States. Thus, under our proposal, if a Federal suit for damages were generally available to enforce a civil rights law against a recipient of Federal funds—and nothing in that law were to exempt the States from such a suit—a Federal suit for damages would be available against a State or a State agency.

In this way, our legislation would eliminate the Court-made barrier to effectuating congressional intent that the holding in the *Atascadero* case raises. Under the bill as amended, a statute that is, on its face, equally as applicable to and enforceable against a State agency as it is against other entities, would be enforceable by the same means against State and non-State entities alike.

Our legislation also specifies that it would take effect, with respect to each affected statute, on the date that the law in question took effect. Thus, for example, in the case of section 504 of the Rehabilitation Act of 1973, which took effect on September 26, 1973, its date of enactment, our proposal would take effect retroactive to that date.

Finally, I would note my understanding that, as has been clearly established in Supreme Court cases, including the *Atascadero* case, over the past 21 years, the Congress has the authority to waive the States' 11th amendment immunity under the following provisions of the Constitution: the commerce clause, the spending clause, and section 5 of the 14th amendment. In my view, this legislation is clearly authorized by at least the latter two provisions.

CONCLUSION

Mr. President, without regard to one's views about the reasoning underlying the *Atascadero* case—and I believe, as did the four dissenting Justices in the case, that the decision was misguided—I believe that the overwhelming majority of my colleagues would agree that civil rights laws prohibiting discrimination on the part of Federal agencies and the recipients of Federal financial assistance should be enforceable against the States to the same extent that they are enforceable against municipalities and units of local governments, private schools, businesses, and other entities—and the Federal Government itself. Our bill would provide for that result and, thus, make clear that the States may be held accountable in Federal court for injuries they inflict on disabled

persons, women, members of minority groups, and older persons through violations of such statutes.

Thus, I urge my colleagues to give this legislation prompt and thorough consideration and strong support. A very significant part of our national legal framework for combating unjust discrimination has been destroyed. We in the Congress should repair the damage as swiftly as possible.

(The text of amendment No. 584 appears in today's RECORD under "Amendments Submitted.")

By Mr. THURMOND (for himself, Mr. HATCH, Mr. DENTON, and Mr. EAST) (by request):

S. 1580. A bill to provide for comprehensive reforms and to achieve greater equity in the compensation of attorneys pursuant to Federal statute in civil and administrative proceedings in which the United States, or a State or local government, is a party; to the Committee on the Judiciary.

LEGAL FEES EQUITY ACT

Mr. THURMOND. Mr. President, I am introducing today an administration proposal—the Legal Fees Equity Act—to provide a revamping of the federally mandated attorney compensation schemes applicable to civil, criminal, and administrative proceedings involving the United States and to civil proceedings involving State and local governments.

The purpose of this legislation is to provide a statutory framework for a more equitable balance in compensation for professional legal services rendered in litigation involving the Government. In seeking to attain this goal, the bill would:

Set a \$75 per hour maximum rate for attorney's fees awarded, and eliminate the use of bonuses and multipliers to escalate fee awards. This will compensate private attorneys general at a level commensurate with—but still significantly higher than—that of their Government counterparts, but provide a reasonable incentive sufficient to attract competent counsel;

Allow recovery of attorneys' fees only when party has prevailed on the merits of its complaint, or where the suit is concluded by a favorable settlement agreement;

Allow recovery of attorneys' fees only for work performed on issues on which the party prevailed;

Permit the reduction or denial of the amount of fee awards, for example, where a party has unreasonably protracted the litigation; where the services provided were excessive with regard to the nature of the controversy; or where the fee award would unreasonably exceed the hourly salary of a salaried attorney;

Provide that monetary judgment be reduced—but not more than 25 percent—by the amount of the attorneys' fees allowed in the proceeding. Exceptions are allowed for suits under certain provisions of the Equal Access to Justice Act, suits for recovery of dis-

puted taxes, or in cases of undue hardship;

Establish certain procedural requirements for attorneys' fee applications, including a 30-day time limit after final judgment for submitting fee applications, and require courts and agencies to develop additional guidelines; and

Clarify the circumstances in which attorneys' fees may be awarded when a claim becomes moot or the party refuses to accept a reasonable settlement offer.

Mr. President, I ask unanimous consent that the bill be printed in the RECORD along with the letter of transmittal from the Department of Justice and accompanying section-by-section analysis.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 1580

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Legal Fees Equity Act."

SEC. 2. Findings and Purposes.

(a) Congress hereby finds and declares that—

(1) Many Federal statutes authorize awards of attorneys' fees to be made to parties who prevail against the United States, or against state or local governments, in judicial and administrative proceedings;

(2) The failure to provide standards to guide courts and administrative bodies in awarding such fees has led to inconsistent interpretations of these federal civil fee-shifting statutes, and in many instances to excessive awards of attorneys' fees under them;

(3) It is inappropriate for the federal government to impose on state and local governments the statutory requirement to pay awards of attorneys' fees without providing standards by which to make such awards;

(4) The limitation of \$75 per hour prescribed by Congress for civil judicial and administrative proceedings under the Equal Access to Justice Act provides a reasonable and appropriate maximum hourly rate for the award of attorneys' fees against the United States, or against state or local governments, in judicial or administrative proceedings;

(5) It is inappropriate for awards of attorneys' fees to be made to parties who have not prevailed on the merits of their complaint against the United States, or against state or local governments, in judicial or administrative proceedings;

(6) It is appropriate that parties in judicial or administrative proceedings against the United States, or against state or local governments, pay a reasonable portion of their attorneys' fees when monetary awards are recovered;

(7) Statutory provisions are necessary to control the circumstances and conditions under which awards of attorneys' fees and related expenses or costs may be made against the United States, or against state or local governments, in judicial or administrative proceedings; and

(8) Statutory amendments are also appropriate to limit the circumstances in which federal agencies hire outside private counsel from litigation and the amounts at which such outside counsel can be paid.

(b) It is the purpose of this Act—

(1) To establish a uniform hourly rate that shall be the maximum compensation authorized to be awarded against the United States, or against state or local governments, in judicial or administrative proceedings to which any federal fee-shifting statute applies;

(2) To require that awards of attorneys' fees against the United States, or against state or local governments, in judicial or administrative proceedings to which any federal fee-shifting statute applies be made only to parties who have prevailed in the proceedings;

(3) To prescribe standards for the awarding of attorneys' fees and related expenses or costs against the United States, or against state or local governments, in judicial or administrative proceedings to which any federal fee-shifting statute applies; and

(4) To authorize the Attorney General to promulgate regulations governing the circumstances in which federal agencies can retain outside private counsel for litigation and to impose a uniform limit on the rates such counsel can be paid from appropriated funds.

SEC. 3. DEFINITIONS.

For the purpose of this Act—

(1) "Attorneys' fees" means fees attributable to professional legal services performed by a person, or persons, licensed to practice law (but shall not include services by pro se claimants), or to services by enrolled tax practitioners with respect to proceedings before the United States Tax Court, including overhead expenses, as defined in this Act, but not including related expenses;

(2) "Fee-shifting statute" means any federal statute that provides for recovery by a party of attorneys' fees or related expenses against the United States, or against a state or local government;

(3) "Overhead expenses", except in extraordinary circumstances, shall include, but not be limited to, rent or mortgage payments, maintenance (including heating and cooling costs), furniture and supplies, reporters, treatises, and other books, secretarial and other clerical and librarian time (including computer word processing expenses), telephone services and calls, and mailing expenses;

(4) "Related expenses" means those expenses that may be awarded pursuant to a federal law, and which are actually incurred by the attorney in connection with judicial or administrative proceedings, but does not include attorneys' fees or overhead expenses, as defined in this Act, or costs enumerated in section 1920 or title 28, United States Code;

(5) "Party" means, for purposes of judicial proceedings, a party as defined by Rule 17 of the Federal Rules of Civil Procedure, or, for purposes of administrative proceedings, a party as defined in section 551(3) of Title 5, United States Code;

(6) "Judicial proceeding" means a civil proceeding in any court or under the jurisdiction of a judicial officer, in which a party may by law be awarded attorneys' fees or related expenses;

(7) "Administrative proceeding" means any proceeding, other than a judicial proceeding, in which a party may by law be awarded attorneys' fees or related expenses;

(8) "Administrative officer" means the official(s) or person(s) authorized by statute or regulation to decide the substantive issues being considered in an administrative proceeding, or the official(s) or person(s) designated by the head of the agency as the administrative officer(s) for the purpose of this Act;

(9) "Prevailed on the merits" means having obtained a final decision in which

the party has succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues, and may include, where the party is a defendant in a suit by the government, obtaining the dismissal of the complaint;

(10) "Final decision" means a final judgment by the court, or a final order by an agency, in which a party establishes entitlement to relief on the merits of the claim or claims brought in the proceeding, and includes a judgment or order obtained by a party dismissing the proceeding with prejudice or pursuant to a settlement agreement;

(11) "United States" means the United States, or any agency of the United States, or any official of the United States acting in his or her official capacity;

(12) "State" means any state government, or any agency of the state government, or any official of the state government acting in his or her official capacity, and includes the territories and the District of Columbia; and

(13) "Local government" means any county, city, town, municipality, municipal corporation, school board, special governmental district, or other political subdivision created by a state, or any agency of such entity, or any official of such entity acting in his or her official capacity.

SEC. 4. SCOPE AND APPLICATION; RELATIONSHIP TO OTHER LAWS.

(a) The provisions of this Act—

(1) apply to any judicial or administrative proceeding in which a award of attorneys' fees and related expenses is authorized, pursuant to any federal fee-shifting statute, to be made against the United States, or a state or local government; and

(2) establish minimum criteria and requirements for the award of attorneys' fees and related expenses to which this Act applies.

(b) Notwithstanding any other provision of law, no award of attorneys' fees or related expenses shall be made against the United States, or against state or local governments, in any judicial or administrative proceeding, except as expressly authorized by law (other than this Act), and in accordance with the provisions of this Act. No such award shall exceed the amount determined under the provisions of this Act.

(c)(1) The provisions of any applicable federal fee-shifting statute that establish criteria or requirements in addition to those provided in this Act for the award of attorneys' fees and related expenses in such proceedings, or that otherwise limit awards of attorneys' fees in such proceedings, shall apply in addition to the provisions of this Act.

(2) Nothing in this Act shall be interpreted to create any right to, or provide any authority for, an award of attorneys' fees or related expenses in any judicial or administrative proceeding.

(d) No award of attorneys' fees or related expenses shall be made under a federal fee-shifting statute against a party who has intervened to defend the validity of a law or action of the United States, or a state or local government, and who has not been found to have violated a constitutional or statutory right of the party seeking the award.

(e) Awards of attorneys' fees and related expenses otherwise authorized under section 504 of title 5 of the United States Code or section 2412(d) of title 28 of the United States Code (the Equal Access to Justice Act) shall be made in accordance with the provisions of this Act, except that subsections (a)(1), (b)(1)(C), (b)(2)(A), and (c) of section 6 of this Act shall not apply.

(f) The provisions of this Act shall not apply to compensation of attorneys in proceedings under section 3006A of title 18, United States Code.

SEC. 5. ALLOWANCE OF ATTORNEYS' FEES.

A party otherwise eligible to receive attorneys' fees and related expenses to which this Act applies must establish that—

(1) the party has prevailed on the merits against the United States, or against a state or local government;

(2) the work for which the award of attorneys' fees and related expenses is sought—

(A) was performed in the judicial or administrative proceeding in connection with issues upon which the party prevailed against the United States or against a state or local government; and

(B) was not excessive, redundant, or otherwise unnecessary to resolve the controversy; and

(3) the application for attorneys' fees and related expenses is made in accordance with sections 6(a) and 7 of this Act.

SEC. 6. AMOUNT OF ATTORNEYS' FEES.

(a)(1) No award of attorneys' fees against the United States, or against the state or local government, to which this Act applies shall exceed \$75 per hour.

(2) Bonuses or multipliers shall not be used in calculating awards of attorneys' fees.

(b)(1) The court or administrative officer shall reduce or deny accordingly the amount of attorneys' fees and related expenses otherwise allowable if it is found that—

(A) the prevailing party, during the course of the proceeding, engaged in conduct that unreasonably protracted the final resolution of the controversy;

(B) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly salary of the the attorney representing the party; or

(C) the time spent and legal services provided were excessive with regard to the nature of the controversy.

(2) The court or administrative officer, in the exercise of discretion, may reduce or deny an award where—

(A) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or value of injunctive relief achieved in the proceeding; or

(B) a reduction or denial of the amount of attorneys' fees would otherwise be appropriate under the applicable fee-shifting statute.

(c) Whenever a monetary judgment is awarded in any judicial or administrative proceeding to which a federal fee-shifting statute applies, a portion of the judgment (but not more than 25% thereof) shall be applied to satisfy the amount of attorneys' fees authorized to be awarded against the United States, or against a state or local government. If the authorized award of attorneys' fees exceeds 25% of the judgment, the excess shall be paid by the United States, or the state or local government. This subsection shall not apply to awards of attorneys' fees pursuant to section 7430 of the Internal Revenue Code.

(b) Section 593(g) of title 28, United States Code, relating to independent counsel investigations, is amended by adding at the end thereof the following new sentence: "Such award shall not exceed \$75 per hour."

SEC. 7. TIMELY APPLICATIONS AND PROCEDURES.

(a) In any judicial or administrative proceeding to which this Act applies, a party may seek an award of attorneys' fees and related expenses only within thirty days after

a final decision by the court or agency from which no appeal is taken. The party seeking an award of attorneys' fees shall submit to the court or agency such information as may be required by the court or agency.

(b) Courts and agencies shall develop procedures, not inconsistent with this Act, for filing of applications for awards of attorneys' fees, which shall provide guidance as to what information should be required to be submitted pursuant to subsection (a) of this section, when such information should be submitted, and when determinations should be made concerning awards of attorneys' fees and related expenses. In no event shall an award of attorneys' fees and related expenses be made prior to entry of a final decision by the court or agency.

SEC. 8. Mootness and Settlement Defenses

No award of attorneys' fees and related expenses subject to the provisions of this Act may be made—

(1) where the government demonstrates that—

(A) the claims have become moot due to a change in government policy, and

(B) the pendency of the judicial or administrative proceeding was not a material factor in such change in policy; or

(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that the relief finally obtained by the party is not more favorable to the party than the offer of settlement.

SEC. 9. COMPTROLLER GENERAL REPORT.

The Comptroller General of the United States shall submit on April 1 of each year a report to the President and the Congress on the amount of attorneys' fees and related expenses awarded during the preceding fiscal year against the United States, or against state or local governments, in judicial and administrative proceedings to which this Act applies. The courts and each agency shall provide the Comptroller General with such information as is necessary to comply with the requirements of this section.

SEC. 10. LIMITATION ON EMPLOYMENT AND COMPENSATION OF OUTSIDE, PRIVATE COUNSEL.

Section 3106 of title 5, United States Code, is amended to read as follows:

"§ 3106. Employment of attorneys; restrictions

"(a) Except as otherwise authorized by law, the head of an Executive department, military department, or other agency, including and independent agency, board, or commission, may not employ an attorney or counsel for the conduct of litigation in which the United States, as agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

"(b) Notwithstanding any other provision of law—

(1) an Executive department, military department, or other agency, including an independent agency, board, or commission, shall not retain outside, private counsel for the conduct of judicial or administrative litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, except upon a certification of need by the Attorney General and in accordance with regulations promulgated by the Attorney General; and

(2) no payment from appropriated funds to such outside, private counsel retained pursuant to subsection (b)(1) shall exceed \$75 per hour.

"(c) The Attorney General, after consultation with the Office of Management and

Budget, the Office of Personnel Management, and other interested agencies, and upon public notice and comment pursuant to section 553 of this title, shall promulgate regulations implementing this section, including—

(1) the circumstances, terms, and conditions under which Executive departments, military departments and other agencies, including independent agencies, boards, and commissions, are authorized to employ outside, private counsel to be paid from appropriated funds;

(2) procedures for the receipt and prompt resolution of applications from any agency for a certification of need by the Attorney General, in a particular case or class of cases, authorizing the retention of outside, private counsel for litigation in circumstances not otherwise permitted under this section; and

(3) the coordination of the use and availability of the expertise of attorneys within the Executive Branch of government for litigation.

The regulations authorized by this subsection and the determinations of the Attorney General pursuant to such regulations shall not be subject to judicial review.

"(d) For the purposes of this section, the term "outside, private counsel" means an attorney, firm, legal services organization, or association engaged in the practice of law other than as an employee of the United States.

"(e) This section does not apply to the employment and payment of counsel under section 1037 of title 10."

SEC. 11. EFFECTIVE DATE.

The provisions of this Act shall apply to any award of attorneys' fees and related expenses incurred subsequent to the enactment of this Act, including those incurred after such date in actions commenced prior to such enactment.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND
INTERGOVERNMENTAL AFFAIRS,
Washington, DC, July 31, 1985.

Hon. GEORGE BUSH,

President of the Senate, Washington, DC.

DEAR MR. PRESIDENT: Enclosed for your consideration and appropriate reference is a legislative proposal "To provide for comprehensive reforms in compensation of attorneys pursuant to federal statute in civil, criminal, and administrative proceedings in which the United States is a party, and in civil proceedings involving state and local governments."

The proposal, known as the "Legal Fees Equity Act," would establish standards and procedures for awards of attorneys' fees in civil judicial and administrative proceedings against the United States, states, and local governments in cases where federal statutes allow such awards, and eliminates excessive awards in such cases. This bill specifically includes fee awards to subjects of investigations under the Independent Counsel statute, 28 U.S.C. § 593(g), and also expands the authority of the Attorney General over the hiring of outside counsel by federal agencies for litigation.

Numerous federal statutes provide that parties to civil suits and administrative proceedings against the United States, states, or local governments may, in appropriate circumstances, recover, "reasonable attorneys' fees" from government defendants. These fee-shifting statutes, for the most part, provide little or no guidance as to when an award of attorneys' fees is appropriate, or as to what constitutes a reasonable award. As a consequence, courts have reached conflicting interpretations of these statutes, and in some cases have made

awards of attorneys' fees that greatly exceed the relief obtained by the parties in the proceeding. Multipliers and bonuses have been used to double, even triple normal commercial hourly rates. Attorneys' fees awards at rates in excess of \$100 per hour are becoming increasingly common, with some attorneys' fee requests exceeding \$400 per hour through the use of multipliers.

Federal, state, and local taxpayers are the ones who must bear the cost of these excessive attorneys' fee awards that confer windfalls upon a select group of attorneys. These developments have fueled litigation over attorneys' fee awards that frequently overshadows the case on the merits, and have created a burgeoning area of practice for legal practitioners and publishers who hold themselves out as experts on how to obtain large awards of attorneys' fees against government defendants.

The need for legislation is, if anything, even more acute with respect to the award of attorneys' fees against state and local governments than against the federal government. As the liability of states and localities for damages and awards of attorneys' fees has greatly expanded under new federal statutes and recent decisions of the Supreme Court, the obligation of Congress to define more clearly the circumstances and extent to which these entities should be liable for attorneys' fees under federal statutes has also grown. The sound functioning of our federal system demands that the national government should not impose upon the state governments an obligation to pay attorneys' fees in circumstances and amounts not limited by Congress.

We are pleased that Congress was able last year to pass part of this proposal doubling the rates for cases under the Criminal Justice Act, 18 U.S.C. § 3006A, but we think that only strengthens the case for enacting the balance of this comprehensive reform of attorneys' fee statutes. We can see no justification for allowing the award of attorneys' fees at the rate of several hundred dollars per hour in civil actions when attorneys representing defendants in criminal proceedings or habeas corpus actions are paid at the revised rates of \$40 or \$60 per hour. The current state of the law still reflects a serious misallocation of resources, at the expense of the public treasury. The intent of the bill is to achieve a more equitable balance in compensation among the various attorneys litigating for or against the government—attorneys for the government, defense attorneys paid, under the Criminal Justice Act, and private attorneys receiving fees under fee-shifting statutes.

The Department of Justice urges prompt and favorable consideration of the proposed legislation, which would establish much-needed guidelines for awards of attorneys' fees in civil cases against federal, state, and local government defendants. Enactment of this legislation would promote a more equitable system of compensation for attorneys paid by the government in civil cases, and should substantially reduce the present burdens of litigation over attorneys' fee awards, which one Supreme Court Justice has labeled "one of the least socially productive types of litigation imaginable." *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1944 (1983) (Brennan, J., dissenting).

The brief summary accompanying this letter outlines the salient features of the bill.

The Office of Management and Budget has advised this Department that the enact-

ment of this proposed legislation would be in accord with the President's program.

Sincerely,

PHILLIP D. BRADY,
Acting Assistant Attorney General

SUMMARY OF KEY PROVISIONS OF THE BILL

1. **Level of the Fee Cap:** The bill would set the maximum rate for attorney compensation in civil judicial and administrative proceedings under all federal fee-shifting statutes at \$75 per hour, which is the same rate established in the Equal Access to Justice Act, 28 U.S.C. § 2412(d) and 5 U.S.C. § 504 (which is still in effect for cases filed before October 1, 1984). The bill would, in all cases under federal fee-shifting statutes, eliminate bonuses and multipliers that courts have used excessively to escalate awards of attorneys' fees.

Because private attorneys in cases under federal fee-shifting statutes are, in one sense, doing "government legal work," it is inappropriate for the compensation that taxpayers pay to "private attorneys general" who sue the government to exceed significantly the compensation paid to the "public attorneys general" who defend the government. The proposed legislation would compensate private attorneys at a level commensurate with (but still significantly higher than) that of their government counterparts, and would provide for a reasonable incentive sufficient to attract competent counsel in fee-shifting cases.

2. **Awards to Prevailing Parties:** The bill would allow recovery of attorney's fees only when a party has prevailed on the merits of its complaint, or, in accordance with existing case law, where the suit is concluded by settlement agreement. In addition, the bill would allow recovery of attorneys' fees only for work performed on issues in the case on which the party prevailed, and only to the extent the work performed was not excessive, redundant, or otherwise unnecessary.

3. **Reduction of Fee Awards:** The bill would specify several bases for reducing or denying fee awards that otherwise would be allowed under federal fee-shifting statutes. Reduction of the award would be appropriate, for example, in cases where a party has unreasonably protracted the litigation; where the award is excessive in comparison to the monetary results achieved in the litigation; or where the services provided were excessive with regard to the nature of the controversy. The bill would also provide for reduction of the fee award when it unreasonably exceeds the hourly salary of a salaried attorney. As a guideline, the proposal would require special scrutiny of awards at rates exceeding an amount double an attorney's hourly salary. Allowing twice the hourly salary should cover normal overhead expenses and provide for a reasonable allowance in most cases. The provision would not require courts to limit awards to an amount twice the attorneys' hourly salary; but is designed to ensure that courts carefully review awards to salaried attorneys so as to avoid conferring windfalls at the expense of taxpayers.

The bill would also provide that, in any case where a party recovers a money judgment against a federal, state, or local government, up to 25% of the judgment shall be applied to the party's legal fees. This provision would not apply to suits under certain provisions of the Equal Access to Justice Act that allow attorneys' fees only when the government's position is not found to be substantially justified. This provision also would not apply to suits for recovery of disputed taxes under 27 U.S.C. § 7430.

4. **Procedural Guidelines:** The bill would establish certain procedural requirements

for processing of attorneys' fee applications under federal fee-shifting statutes, and would require courts and agencies to develop additional guidelines.

5. **Independent Counsel Investigations:** To avoid any ambiguity in the coverage of the legislation, the bill would specifically amend the Independent Counsel statute, 28 U.S.C. § 593(g), to impose the same \$75 per hour limitation upon any fee award to a subject of an investigation under that statute.

6. **Limitation on Outside Counsel Retained by Federal Agencies:** To further the comprehensive nature of the bill, and to promote efficiency and economy in the federal government's use of outside counsel, the bill would impose a \$75 per hour limit upon the amounts payable to outside private counsel retained by any federal agency for litigation where the taxpayers must foot the bill. It would also authorize the Attorney General to promulgate regulations governing the circumstances in which any federal agency could retain outside counsel for litigation. Although the Department of Justice presently has such regulations and enforces a \$75 per hour limit for outside counsel in litigation subject to its litigation control, legislation such as this is necessary in order to extend the Attorney General's authority over the outside counsel practices of agencies with independent litigation authority. This amendment only relates to the hiring of outside counsel from appropriated funds for purposes of litigation, and does not affect an agency's use of its own attorney's for litigation.

SECTION-BY-SECTION ANALYSIS

SECTION 1—SHORT TITLE

Section 1 provides that the Act may be cited as the "Legal Fees Equity Act."

SECTION 2—FINDINGS AND PURPOSES

Numerous federal statutes provide that parties to Civil suits and administrative proceedings against the United States, states, or local governments may, in appropriate circumstances, recover "reasonable attorneys' fees" from government defendants. These statutes have put a great burden on the courts because, for the most part, Congress has provided little or no guidance as to when an award of attorney's fees is appropriate, or as to what constitutes a reasonable award. As a consequence, courts have reached conflicting interpretations of these statutes—in some cases using "multipliers" and "bonuses" to double, and even triple, the normal hourly rates of the prevailing party's attorney. This has resulted in uncertainty at least the appearance of arbitrariness or unfairness to litigants. Litigation over attorneys' fee awards frequently overshadows the case on the merits, and has led to the creation of a burgeoning area of practice for attorneys' fee litigators.

The problems evident in this area are in some respects even more serious with respect to the states and localities. Recent decisions of the Supreme Court have expanded greatly the liability of states and local governments to suits under various Federal statutes, and correspondingly to awards of attorneys' fees. As the liability of the states and localities has greatly expanded in recent years, the obligation of Congress to define more clearly the circumstances and extent to which they should be held liable for attorneys' fees under Federal statutes has also grown.

The purpose of the bill is to have Congress provide greater guidance to the courts and federal agencies for the award of attorneys' fees pursuant to federal statute, and to reduce the current uncertainties and disparities reflected in the present decisions. The bill is not intended to deny fees to at-

torneys for prevailing parties; only to set common standards and procedures that would apply to all awards of attorneys' fees against the United States, and against state and local governments. This will increase the fairness and equity of the current maze of fee-shifting statutes, and should increase public acceptance of these statutes which compensate private attorneys from the public treasury.

With respect to civil judicial and administrative proceedings, the bill is intended to provide guidance in the calculation of fee awards, and to limit the hourly rate of compensation to \$75 per hour, which is the same rate established in the Equal Access to Justice Act, 28 U.S.C. § 2412 (d)(1) and (d)(3) and 5 U.S.C. § 504(b). This \$75 per hour rate would also apply specifically to a fee award to a subject of an independent counsel investigation pursuant to 28 U.S.C. § 593(g). The bill would eliminate the use of bonuses and multipliers.

The bill is also intended to limit the recovery of attorneys' fees to those cases in which a party has prevailed on the merits of the complaint, and only for work performed on issue in the case on which the party prevailed. The bill also specifies several discretionary bases for reducing or denying fee awards that otherwise would be allowed under federal fee-shifting statutes—for example, where a party's conduct unreasonably protracted the litigation; or the requested fee award unreasonably exceeds the hourly salary of a salaried attorney—and provides, in any case where a party recovers a money judgment against a federal, state, or local government, for up to 25 percent of the judgment to be applied to the party's legal fees.¹

Finally, the bill would amend the existing restrictions of 5 U.S.C. § 3106 to expand their coverage specifically to include the employment of outside private counsel by federal agencies.

SECTION 3—DEFINITIONS

Section 3 defines the terms used in the bill. "Attorneys' fees" are defined as fees attributable to professional legal services performed by a person, or persons, licensed to practice law, including enrolled tax practitioners who practice before the United States Tax Court. This definition is intended to limit awards to licensed practitioners, and not to allow awards to non-licensed, pro se claimants or law students.² The defini-

¹ This 25 percent reduction would not apply to suits under certain provisions of the Equal Access to Justice Act, or to suits for recovery of disputed taxes under 28 U.S.C. § 7430.

² Most courts have ruled that pro se litigants generally are ineligible for attorneys' fees awards. See *Coffield v. City of Atlanta*, 648 F.2d 888 (5th Cir. 1981); *Owens-Eli v. Robinson*, 498 F. Supp. 877 (W.D. Pa. 1980); *Crooker v. Department of Justice*, 632 F.2d 916, 922 (1st Cir. 1980); and *Burke v. Department of Justice*, 558 F.2d 1182 (10th Cir. 1977), aff'g mem. 432 F. Supp. 251 (D. Kan. 1976). The D.C. Circuit, however, has awarded attorneys' fees under the FOIA to pro se prisoners and to law students who received 12 hours of course credit. See *Crooker v. Department of Treasury*, 663 F.2d 140 (D.C. Cir. 1980); *Jordan v. Department of Justice*, 681 F.2d 514 (D.C. Cir. 1982). The definition of "attorney," however, is not intended to affect judicial interpretations regarding whether individual statutes authorize awards of attorneys' fees to licensed attorneys appearing pro se. For example in *White v. Arlen Realty & Development Corp.*, 614 F.2d 367 (4th Cir.) (per curiam), cert. denied, 447 U.S. 923 (1980), the Fourth Circuit denied an award of attorneys' fees to a plaintiff-attorney under the Truth-in-Lending Act.

tion applies to all fee-shifting statutes, and is intended to cover all awards of fees that in fact reflect compensation of attorneys, however denominated, including those designated as "costs" by the court or administrative agency.³ "Attorneys' fees" includes "overhead expenses" but does not include "related expenses."

Expenses to be included as "overhead expenses" should be considered as such except in extraordinary circumstances. The list of overhead expenses is not exhaustive, and other appropriate expenses may be included as "overhead expenses." The list is intended to preclude considering these expenses as "related expenses," except in extraordinary circumstances.

"Related expenses" are those expenses that may be awarded pursuant to federal statute, are not "overhead expenses," and are actually incurred by the attorney as a result of judicial or administrative proceedings. The term is intended to be a generic term encompassing those expenses that can properly be awarded under federal law; it does not expand the types of expenses that may be awarded. "Related expenses" does not include "attorneys' fees."

This definition is not intended to affect case law under Title VII and 42 U.S.C. § 1988 which, in some instances, has authorized awards of costs beyond those specified in 28 U.S.C. § 1920 to include such items as lodging and travel expenses. See, e.g., *Northcross v. Board of Education*, 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980). However, as noted, the definition of overhead expenses precludes considering the items enumerated there as "related expenses." The definition also excludes costs enumerated in 28 U.S.C. § 1920, and the bill is not intended to affect the allocation of costs enumerated in that section.

Courts and administrative officers may include as "related expenses" actual costs incurred for the services of paralegals and law clerks who assist attorneys in representing their clients.

The definitions of "final decision" and "prevail on the merits" are discussed in connection with the provisions of section 5(1) of the bill, which requires that a party seeking an award of attorneys' fees must prevail on the merits.

SECTION 4—SCOPE AND APPLICATION; RELATIONSHIP TO OTHER LAWS

Subsection (a) provides that the provisions of this bill are intended to apply to all awards of attorneys' fees against the United States, or any state or local government, and to establish minimum criteria for such awards. In this way, this bill will provide greater uniformity in the application of the scores of fee-shifting statutes that authorize awards of attorneys' fees and related expenses against the federal, state, and local governments.

Subsection (b) provides the general rule that, notwithstanding any other provision of law, the provisions of this bill would apply to, and modify, all federal fee-shifting statutes, including the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412 (b) and (d). No award of attorneys' fees and

related expenses could exceed the amounts determined under the bill.

Nothing in this bill is intended to overturn cases such as *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978), where the Supreme Court held that attorneys' fees may be awarded to a prevailing defendant if the plaintiff's claim is found to be "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Moreover, 28 U.S.C. § 2412(b) presently provides a statutory basis for the award of attorneys' fees against the United States under certain established common law theories. However, any such awards would be governed by the provisions of this bill.

Subsection (c)(1) provides that the criteria for the award of attorneys' fees and related expenses established by this bill would not supersede more restrictive criteria contained in other statutes for making such awards. The provisions of this bill establish minimum criteria to be applied for determining and awarding attorneys' fees and related expenses or costs in judicial and administrative proceedings against the United States or against state or local governments.⁴ Subsection (c)(2) provides that nothing in the bill shall be interpreted to create any right to an award of attorneys' fees of related expenses. Any right to such an award derives solely from the provisions of other laws. Where the underlying federal law does not provide authority for an award of attorneys' fees, see, e.g., *Webb v. Board of Education*, 105 S. Ct. 1923 (1985), there would be no basis for a fee award under this bill.

The bill does not affect the compensation of attorneys in suits against the government such as those under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, or involving National Service Life Insurance or United States Government Life Insurance, under 38 U.S.C. § 784(g). Those statutes are not federal fee-shifting statutes, because the final award of damages or proceeds is calculated without reference to attorneys' fees and there is no additional element of the award that is attributable to the prevailing party's attorneys' fees. However, the bill would apply to an award of attorneys' fees under any statute that requires the inclusion of a separate element in the damage award to account for attorneys' fees. See e.g., the Uniform Property Relocation Act, 42 U.S.C. § 4654(c).

Subsection (d)(1) is similar to provisions for determining attorneys' fees in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1619(d)(2). Subsection (d)(2) is intended to protect a party intervening in defense of his own interests with respect to a governmental action but whose conduct did not give rise to the dispute at issue from the specter of liability through an automatic shift of attorneys' fees should the plaintiff prevail. Under the fee-shifting statutes generally, a plaintiff who does not prevail is ordinarily not liable for the government's attorneys' fees. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Similarly, an intervenor-defendant who defends his own rights under the challenged governmental scheme but whose conduct did not give rise to the controversy and did not violate the constitutional or statutory rights of the plaintiff also should not ordinarily be liable for attorneys' fees.

⁴ For example, 5 U.S.C. § 7701(g)(1) provides that attorneys' fees may be awarded if (1) the party has prevailed; and (2) the award of attorneys' fees would be "warranted in the interest of justice. . . ." The second of these two criteria, which is not contained in the bill, would continue to apply.

Subsection (e) provides that, although the bill generally would apply to awards under the Equal Access to Justice Act ("EAJA"), the provisions of section 6(a)(1) (establishing a limitation of \$75 per hour for attorneys' fees) and section 6(c) (reduction of fee awards in money damages cases) of the bill would not apply to awards made under 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412 (d)(1)(A) and (d)(3) (as in effect for cases filed before October 1, 1984). Those provisions of the EAJA provide for awards of attorneys' fees to eligible parties who prevail in litigation with the United States unless the government proves that its position in the litigation was substantially justified. Those provisions already have a general rule limiting fee awards to no more than \$75 per hour. In addition, the factors listed for reduction of fee awards in paragraphs (3) and (4) of section 6(b) of the bill would not apply under those provisions of the EAJA.⁵ The language and legislative history of those provisions of the EAJA reflect Congress's intent to award attorneys' fees to prevailing parties who meet the qualifications of that Act, unless the government's position was "substantially justified" or "special circumstances" would make an award of attorneys' fees unjust. The purpose of this subsection is to assure that the special characteristics of the EAJA in this respect will not be affected by this bill. The exceptions described in this subsection would not apply to attorneys' fee awards under 28 U.S.C. § 2412(b).

Subsection (f) provides that the provisions of the bill shall not apply in federal criminal proceedings or civil habeas corpus proceedings in the federal courts under the Criminal Justice Act, 18 U.S.C. § 3006A.

SECTION 5—ALLOWANCE OF ATTORNEYS' FEES

Section 5 of the bill establishes the prerequisites to an award of attorneys' fees and related expenses against the United States, or against state or local governments, in any civil judicial or administrative proceeding to which a federal fee-shifting statute applies. The party seeking such awards must establish, and the court or administrative officer must determine, (1) that the party prevailed on the merits of its complaint in the proceeding; (2) that the work for which the award is sought was performed in the proceeding in connection with issues on which the party prevailed against the United States or a state or local government and was necessary to resolve the controversy; (3) that the application is submitted in compliance with the procedural requirements of Section 7 and does not exceed amounts authorized under Section 6; and (4) that the services for which attorneys' fees are sought are not excessive, redundant, or otherwise unnecessary.

As set forth in section 4(c) of the bill, the requirements of this section for awards of attorneys' fees, including the requirement that a party "prevail," are not intended to supersede other additional requirements established by law, such as those under 5 U.S.C. § 7701(g)(1) (where an award to a prevailing party must be "warranted in the interest of justice").

Nothing in this section is intended to change the burden of proof for determinations of "substantial justification" in applications for fee awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1).

³ Generally, courts have followed the principle that attorneys' fees, which are authorized by various fee-shifting statutes, are distinct from costs, which are authorized by 28 U.S.C. §§ 2412(a) and 1920. However, some statutes, such as Title VII of the Civil Rights Act and 42 U.S.C. § 1988, have been interpreted to make attorneys' fees part of costs. See *Delta Air Lines v. August*, 450 U.S. 346 (1981) (Title VII). If left unaddressed, parties could attempt to circumvent the \$75 fee limitation and other provisions in this bill regarding attorneys' fees by seeking attorneys' fees as costs under these statutes.

⁵ These discretionary factors authorize a reduction of the attorneys' fee award based on findings that the time and legal services were excessive with regard to the nature of the controversy, or that the amount sought unreasonable exceeds the monetary result or injunctive relief achieved.

and 28 U.S.C. § 2412 (d)(1)(A) and (d)(3) (as in effect for cases filed before October 1, 1984). The burden remains in the government to prove "substantial justification" in connection with such applications.

Prevail on the Merits.—Paragraph (1) would preclude awards of attorneys' fees and related expenses against the United States and against state and local governments unless the party seeking the award prevailed on the merits of its complaint. The definition of "prevail on the merits" focuses on whether the party was successful on significant issues in the controversy and obtained significant relief in connection with these issues. This is intended to be a more flexible standard than some formulations of this term. *CF. Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir. 1981) (a prevailing party for attorneys' fees purposes "has been successful on the central issue" in the case, and has "acquired the primary relief sought"). The relief sought need not be "central," but must be significant in terms of the result sought by the party. In this respect, the bill reflects the first part of the test enunciated by the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit") (emphasis added).

This bill differs, however, from the second part of the *Hensley* formulation. The language of *Hensley* is subject to an overly expansive reading, as the district court did in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), rev'd, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 53 U.S.L.W. 3822 (U.S. June 17, 1985). There, the district court found the plaintiffs to be prevailing parties for all purposes even though they in fact failed to achieve the results sought in important respects.

The purpose of the bill is to state more precisely that the relief obtained by the party must be significant, not merely "some of the benefit" the party sought. The relief obtained should be significant in terms of the result sought by the party in bringing the suit. *CF. Hensley v. Eckerhart*, 461 U.S. at 440 ("A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole").

The requirement to show that the party has prevailed on the merits would also apply to statutes, such as the Clean Air Act, that authorize the award of attorneys' fees "when appropriate."

This paragraph provides that the party must prevail in a "final decision" of a court or a final disposition by an agency in an administrative proceeding. The Federal Rules of Civil Procedure generally define a final judgment as any order from which an appeal lies, including dismissals and default and summary judgments, and final judgments entered on less than all pending claims pursuant to Rule 54(b). In an adversary proceeding, the final decision is one which determines the rights of the parties and from which no further review is provided within the administrative process. The definition of "final decision" is limited to those final judgments in which the party establishes entitlement to relief on the merits. Thus, an award of attorneys' fees would not be appropriate for a party who has pre-

valled only on a motion for preliminary injunction or for a temporary restraining order, where the merits of the suit have not been resolved. However, the definition would permit the award of attorneys' fees where the party defending against a suit brought by the government obtains the dismissal of a groundless complaint.⁷

The bill would preclude so-called "interim awards" of attorneys' fees except where the text or legislative history of an applicable fee-shifting statute indicates that Congress has authorized them, but such awards should be made only "to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Hanrahan v. Hampton*, 448 U.S. 754, 757 (1980) (per curiam). In *Hanrahan*, the Supreme Court noted that the legislative history of 42 U.S.C. § 1988 cited, as examples of appropriate circumstances for interim fee awards, two cases⁸ in which the "party to whom the fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered." Id. at 757. The Court found that the plaintiffs had not prevailed on the merits of any of their claims and reversed the award of attorneys' fees. Id. at 758. Further, the Court ruled that attorneys' fees are not to be awarded for nondispositive rulings regarding matters of discovery, evidence, or procedure. Id. at 759. See also *Smith v. University of North Carolina*, 632 F.2d 318, 350-51 (4th Cir. 1980).

Paragraph (1) is not intended to modify existing case law providing that attorneys' fee may be awarded in cases where the litigation is terminated by settlement agreement, as long as the party seeking fees has prevailed on the merits of the relief sought.⁹ Nor is the provision intended to preclude discussions between the parties of attorneys' fees, or the waiver thereof, before the decision on the merits by a court or the final disposition by an administrative officer, or to prevent the government from discussing liability for attorneys' fees in conjunction with liability on the merits as part of a settlement agreement, or from including in a settlement agreement provisions for attorneys' fees and related expenses or costs.

Necessary Work on Prevailing Issues.—Under paragraph (2), a prevailing party seeking an award of attorneys' fees and related expenses against the United States, or against state or local governments, must show that the work for which fees are sought was performed in connection with

issues, substantive or procedural, upon which the party prevailed in the disposition of the controversy.¹⁰ This provision is not intended to preclude awards of attorneys' fees and related expenses where a party's pleadings contain meritorious alternative grounds for relief, based on the same facts as those on which the party prevailed, on which a court or administrative officer did not rule because the party prevailed on other grounds. In such instances, awards of attorneys' fees and related expenses may include amounts attributable to time expended on such alternative pleadings. If the court or administrative officer determines that the alternative pleadings were reasonably directed to the resolution of the merits of the controversy. Of course, a party who seeks different types of relief under different statutory provisions is not entitled to fees for those claims where no relief was provided; nor are awards of attorneys' fees and related expenses to be made in cases where the specific statutory provisions construed in the case do not provide for the award of attorneys' fees.¹¹

Paragraph (2) also requires the party seeking attorneys' fees to establish that the services for which fees are sought were not "excessive, redundant, otherwise unnecessary."¹² Because prevailing intervenors are "parties" for the purposes of this bill, they may receive awards of attorneys' fees if they meet the requirements of the applicable fee-shifting statute and this bill, including the showing required by this paragraph.

Compliance with this Act.—Paragraph (3) requires that applications for an award of attorneys' fees and related expenses be made in accordance with the provisions of this Act.

SECTION 6—AMOUNT OF ATTORNEYS' FEES

Civil fee-shifting statutes

Paragraph 6(a)(1) establishes a maximum hourly rate of \$75 for attorneys' fees awards against the United States, states, and local governments under federal fee-shifting statutes.¹³ This provision shall not apply to

⁷ See *Hensley v. Eckerhart*, supra, 461 U.S. at 435 ("[W]ork on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' . . . [T]herefore no fee may be awarded for services on the unsuccessful claim.").

⁸ See *Smith v. Robinson*, 104 S. Ct. 2457 (1984) (affirming court of appeals' reversal of district court's award of attorneys' fees where case was grounded on the Education for All Handicapped Children Act, which does not provide for the award of attorneys' fees, even though the plaintiff included allegations based on section 504 of the Rehabilitation Act of 1973 and 42 U.S.C. § 1983, which the courts did not reach). The Court agreed with the respondents' contention that "Whatever Congress' intent was in authorizing fees for substantial, undressed claims based on § 1988 or § 505, it could not have been to allow plaintiffs to receive an award of attorney's fees . . . where Congress has made clear its intent that fees not be available." Id. at 3456. See also *Irving Independent School District v. Tatro*, 104 S. Ct. 3371, 3379 (1984).

⁹ See *Hensley v. Eckerhart*, supra, 461 U.S. at 434 ("Cases may be overstaffed, and the skill and experience of lawyers may vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. Just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.").

¹⁰ In determining the total award of attorneys' fees, courts and administrative officers should continue the practice of determining the number of hours reasonably expended in the proceeding, multiplied by a reasonable hourly rate not exceeding \$75. In deciding whether the hours claimed were "reasonably expended" under any fee shifting statute, the Supreme Court has admonished that "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Hensley v. Eckerhart*,

⁷ See H.R. Conf. Rep. No. 96-1434, 96th Cong., 2d Sess. 21-22 (1980). See also *United States ex rel. Heydt v. Citizens State Bank*, 668 F.2d 444, 447 (8th Cir. 1982) (organization which successfully opposed IRS summons in order to protect the confidentiality of its members was a prevailing party under the EAJA; however, no attorneys' fees were awarded because the IRS position was substantially justified).

⁸ *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), are cited in the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2, and H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 6 (1976).

⁹ See, e.g., *Ward v. Schweiker*, 562 F. Supp. 1173 (W.D. Mo. 1983). As the court stressed in *Parker v. Matthews*, 411 F. Supp. 1059, 1054 (D.D.C. 1976), aff'd, 561 F.2d 320 (D.C. Cir. 1977), the settlement should be carefully scrutinized to determine if an award of attorneys' fees is justified:

"[W]hether to award attorneys' fees where there has been a settlement of a title VII lawsuit must be determined by a close scrutiny of the totality of the circumstances surrounding the settlement, focusing particularly on the necessity for bringing the action and whether the party is the successful party with respect to the central issue—discrimination."

¹³ The Supreme Court in *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274, 3281 (1983), held that the claimant must demonstrate that it enjoyed "some degree of success on the merits" in order to receive attorneys' fees under the Clean Air Act, which provides for such fees "when appropriate."

awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A) and (d)(3), because the EAJA has its own limit of \$75 per hour, subject to specified exceptions.¹⁴ In calculating the amount of any award of fees, section 6(a)(2) provides that multipliers or bonuses shall not be used.

The \$75 per hour limit in subsection (a) is intended to assure that fees paid to private counsel in fee-shifting cases are brought somewhat more in line with the salaries of attorneys who represent the government in these cases, while providing sufficient incentive to attract competent counsel. This is appropriate, because many federal fee-shifting statutes are premised on the theory that groups or individuals who sue the government for the public benefit are acting as "private attorneys general." Attorneys' fees paid by taxpayers to these "private attorneys general" should be generally commensurate with the salaries paid by taxpayers to federal "public attorneys general."¹⁵ Even the rate of \$75 per hour set in the bill is well above the compensation of government attorneys.

It is emphasized that this subsection establishes only a maximum hourly rate of compensation, and that prevailing rates may in fact be less than the maximum allowed under the bill. Courts should give due consideration to the fees normally received by the attorney for similar work and other relevant factors. Attorneys' fees may be awarded at hourly rates less than the maximum established by this bill.

Subsection (b)(1) provides that courts or administrative officers shall reduce or deny awards of attorneys' fees and related expenses against the United States, or against state or local governments, where it is determined that (A) the prevailing party unreasonably protracted the final resolution of the controversy; (B) the attorneys' fee unreasonably exceeds the hourly salary of the attorney; or (C) the time spent and legal services provided were excessive with regard to the nature of the controversy. Subsection (b)(2) also authorizes a reduction or denial of a fee award if (A) the award otherwise allowable would unreasonably exceed the monetary result or the value of injunctive relief achieved in the proceeding; or (B) the award would otherwise be unjust or inappropriate. The amount of any reductions pursuant to subsection (b)(2) shall be at the discretion of the court or administrative officer.¹⁶

supra, 461 U.S. at 434, citing *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc) (emphasis in original). In arriving at the total fee award, the factors set forth in section 6(b) and those identified by the Supreme Court in *Hensley v. Eckerhart*, supra, 461 U.S. at 434-37, should be considered.

¹⁴ The provisions of the Equal Access to Justice Act, unlike other fee-shifting statutes, predicate awards of attorneys' fees not only upon a finding that the party prevailed, but also that the government was not substantially justified in its position. In light of the latter requirement and the EAJA's existing fee limitation provision, it is unnecessary to apply the general fee limitation of this bill to the EAJA.

¹⁵ Federal fee-shifting statutes "should not be implemented in a manner to make the private attorney general's position so lucrative as to ridicule the public attorney general." *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974).

¹⁶ The factors set forth in paragraphs (1)(C) and (2)(A) would not apply to awards under 5 U.S.C. 504 and 28 U.S.C. 2412(d) of the Equal Access to Justice Act (as in effect for cases filed before October 1, 1984). This exception is intended to maintain the status quo in the interpretation of the "special circumstances" provision of the EAJA, and not to affect the courts' construction of that term in the context of fee awards under the EAJA.

Paragraph (1)(A) is patterned on the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(C) and 5 U.S.C. 504(a)(3). Paragraph (1)(C) addresses the problem of a case that is overlawyered. It is derived from *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978), where the district court was directed to determine whether it was reasonably necessary to spend the number of hours claimed by the attorneys in order to perform the legal services for which compensation was sought.

Paragraph (1)(B) provides that the court or administrative officer may consider, as a basis for reducing an otherwise allowable fee award, whether the award would unreasonably exceed the hourly salary of the party's attorney. This provision is intended to apply to all attorneys who are paid on a salaried basis, including in-house counsel and associates in a law firm. As a general guideline, an application for an award may be regarded as unreasonably high under paragraph (1)(B) if it is more than twice the attorney's hourly salary. Twice the attorney's hourly salary should, in general, provide reasonable compensation and cover normal overhead expenses. The bill is intended to encourage courts and administrative officers carefully to review applications for awards that would substantially exceed the actual cost of the litigation, and to reduce awards that would confer windfalls on attorneys or the organizations that employ them.

Paragraph (2)(A) is intended to address the anomalous result where attorneys receive far greater benefit from the litigation than their clients, such as in cases where \$100,000 is awarded in attorneys' fees for a \$10,000 judgment, or where \$22,000 in attorneys' fees is awarded for only a \$500 award to each of three clients. In other cases, the injunctive relief actually achieved in the case might be so limited that it does not warrant the amount of attorneys' fees otherwise allowable. Cf. *Hensley v. Eckerhart*, supra, 461 U.S. at 435-36 & n.11 (The award of full attorneys' fees to a party who has achieved only partial or limited success would be "an excessive amount"). In determining whether reduction of an award is appropriate, courts or administrative officers should consider both the monetary judgment achieved and any significant injunctive or other equitable relief obtained by the parties in the proceeding.

Paragraph (2)(B) provides that the bases for reducing an award of attorneys' fees that are listed in this subsection are not meant to be exclusive, and courts and administrative officers should continue to consider other factors that are appropriate under existing law. See *Hensley v. Eckerhart*, supra, 461 U.S. at 436-37. For example, the legislative history of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, provides that "special circumstances" are to be considered by courts in awarding attorneys' fees. Nothing in this bill is intended to preclude consideration of such "special circumstances" to reduce the amount of fee awards against the government.

Subsection (c) provides that, whenever a monetary judgment is awarded against the United States, or against a state or local government, a portion of the judgment (but not more than 25%) shall be applied to satisfy the amount of attorneys' fees allowed in the proceeding. If a fee award exceeds 25% of the judgment, the defendant government would be liable for the excess. On the other hand, if a fee award is less than 25% of the judgment, the award would be satisfied from the amount of the judgment. Any amount not applied to attorneys' fees, of course, would be paid to the plaintiff.

The rationale for this offset is not to reduce the attorneys' compensation, but to provide that a prevailing party should pay part of its legal expenses from any monetary award recovered in a judicial or agency proceeding. This provision would not apply to attorneys' fee awards under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412 (d)(1)(A) and (d)(3), where fee awards are available only where the government's position was not substantially justified. Cf. note 13, supra. It also would not apply to awards in cases brought for recovery of disputed tax payments under 28 U.S.C. § 7430, in order to avoid inconsistent adjudications under the Internal Revenue Code.¹⁷

The result of the 25 percent reduction in monetary awards to be applied toward attorneys' fees is similar to that under the Federal Tort Claims Act, 28 U.S.C. § 2678, and section 206 of the Social Security Act, 42 U.S.C. § 406, which provide for compensation of attorneys from any monetary awards recovered by the parties, except that the fee award under a fee-shifting statute would not be limited to 25 percent of the judgment.

Independent counsel investigations

As amended in 1982, the statute providing for the appointment of an Independent Counsel to investigate allegations of criminal wrongdoing by the President and other specified Executive officials now authorizes the court to award reimbursement to a subject of an independent counsel investigation for all or part of his or her attorneys' fees incurred in the course of such investigation if no indictment is brought against the subject and the attorneys' fees would not have been incurred but for the Independent Counsel investigation. 28 U.S.C. § 593(g). This statute, however, does not provide for a limitation on the amount of fees awarded.

New subsection 6(d) of the bill would impose a limit of \$75 per hour on awards under the Independent Counsel provision, the same limit as for other civil fee-shifting statutes. This change is made expressly to avoid any uncertainty as to the reach of the statute. As provided in section 11 of the bill, this amendment would apply to all attorneys' fees incurred after the date of enactment of the bill.

Criminal Justice Act fees

As introduced in the 98th Congress (S. 2802 and H.R. 5757), the bill contained provisions that would amend the Criminal Justice Act, 18 U.S.C. § 3006A(d), to double the compensation rates for defense attorneys in criminal proceedings—from \$30 per hour for time expended in court and \$20 per hour for time expended out of court to \$60 and \$40, respectively—and also double the maximum total compensation to \$2,000 per attorney for felony cases, \$800 per attorney for misdemeanor cases, and \$500 per attorney for post-trial and probation revocation proceedings.

¹⁷ Inconsistent adjudications could result because the tax laws permit taxpayers who contest many government tax claims either: (1) to pay the contested taxes and sue for a refund in a district court or in the Claims Court, or (2) to bring suit, without payment, in the Tax Court. A taxpayer who sued in the District or Claims Court and won would receive a monetary award. Presumably, 25% of this amount would otherwise be applied to reduce any attorneys' fees award. However, a taxpayer who sued in the Tax Court and won would not receive a monetary award but, instead, simply a determination that no liability existed. Thus, the 25% reduction would hinge entirely upon the taxpayer's choice of forum, an anomalous result that would otherwise channel many more cases to the already overburdened Tax Court.

Those provisions were enacted separately in the closing days of the 98th Congress as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473. Thus, the much-needed increase in the maximum hourly rates for attorneys who represent parties under the Criminal Justice Act has already been achieved. Accordingly, the bill presently focuses solely on attorneys' fee awards in the civil and administrative context. We see the enactment of this bill as just as significant a step in bringing about a better balance in civil fee awards as the Criminal Justice Act amendments were in the criminal context.

SECTION 7—TIMELY APPLICATIONS AND PROCEDURES

Subsection (a) establishes a jurisdictional requirement that a party seeking an award of attorneys' fees and related expenses submit an application for such award within 30 days of a final decision on the merits by a court or the entry of a final disposition by an administrative officer, from which no appeal is taken. A final decision on the merits is defined as the entry of judgment under the Federal Rules of Civil Procedure, and includes a dismissal of the suit and a dismissal pursuant to a settlement agreement. Parties may not be awarded attorneys' fees and related expenses by a court or administrative officer if the fee award application is made after the 30 day time limit.

This requirement is consistent with the jurisdictional time for filing fee applications pursuant to the Equal Access to Justice Act, and is responsive to the Supreme Court's recent observation that courts can adopt procedural rules setting reasonable time limits for applications for attorneys' fee awards. *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982).¹⁸ Subsection (a) also requires the party seeking an award to submit such information as may be required by the court or agency.

Subsection (b) directs courts and agencies to provide guidance to parties regarding the information required to be filed. Courts and agencies should, at the least, require submission of the following information: a statement of the basis of the claim for attorneys' fees; a statement that attorneys' fees are awardable under applicable law; a statement of the amount sought; a copy of any written fee agreement; and an itemized accounting of the hours expended and the specific tasks performed by the attorney on each issue in the proceedings.¹⁹ Further, courts and agencies should require the submission of information to assist them in making the findings under section 6(b) of this bill, with respect to the reduction of awards of attorneys' fees. Subsection (b) further requires courts and agencies to establish procedures regarding the timing of applications for attorneys' fees and support-

ing information, and the timing of judicial and agency rulings on these applications.²⁰

To ensure that courts are consistent in issuing requirements for submission of information for fee applications, the bill anticipates that the Judicial Conference of the United States would prescribe guidelines for courts to follow in establishing these requirements. These guidelines would not supersede any requirements for submission of information required by law in conjunction with attorneys' fees applications. The bill also anticipates that agencies, when establishing requirements for submission of information in conjunction with fee applications, will follow the guidelines established by the courts.

Section 7(b) requires that these guidelines provide that attorneys' fees may be awarded only final decisions. The meaning of final decision, including dismissals and so-called "interim awards" in the circumstances outlined by the Supreme Court in *Hanrahan v. Hampton*, supra, are discussed in connection with section 5(1) of the bill.

SECTION 8—MOOTNESS AND SETTLEMENT DEFENSES

Under existing law, a party will be held to be a prevailing party and entitled to recover attorneys' fees and related expenses or costs even if the claim has been mooted, if it is found that the suit was a "catalyst" for the change of policy that rendered the claim moot. See, e.g., *Maher v. Gagne*, 448 U.S. 122, 129-30 (1980). Subsection (a) would codify the standard by which pending litigation is determined to have been such a catalyst by requiring that the litigation be a "material factor" in the policy change. This is the standard that is currently being applied by most courts. See, e.g., *Morrison v. Ayoub*, 627 F.2d 869 (3d Cir. 1980), cert. denied, 449 U.S. 1102 (1981). This provision would ensure that courts do not place undue emphasis on chronology—that is, the fact that the plaintiff's case was pending when the government changed the policy that mooted the suit. Under this provision, governments would be encouraged to carry out planned policy reforms without fear of incurring liability for fees in pending suits, but would still be liable for attorneys' fees unless the government could prove that the suit actually was not a "material factor" in the policy change.

Subsection (b) would deny awards of attorneys' fees and related expenses for services performed after a written offer of settlement by the United States, or by state or local governments, if the party refuses the offer but is ultimately able to do no better when the case is resolved on the merits. The Supreme Court has already construed Rule 68 of the Federal Rules of Civil Procedure to reach this same result in cases under 42 U.S.C. § 1983. *Marek v. Chesny*, No. 83-1437 (U.S. June 27, 1985). This subsection would apply the *Marek* result to all fee-shifting statutes under which attorneys' fees are awarded against the government. This would provide an incentive for governments

to make reasonable settlement offers, and encourage parties to give serious consideration to such offers. As the Supreme Court noted in *Marek*, slip op. at 9, "Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives." "This bill would make that construction uniform for all fee-shifting statutes to avoid the need for litigation over the construction of each such statute.

SECTION 9—COMPTROLLER GENERAL REPORT

Section 9 requires the Comptroller General of the United States to submit an annual report to the President and the Congress on the amount of attorney's fees and related expenses or costs awarded against the United States or against state and local governments under federal fee-shifting statutes in judicial and administrative proceedings. To assist the Comptroller General, courts and agencies should provide whatever information is needed. In preparing this report, the Comptroller General should use the reports prepared under the Equal Access to Justice Act by the Director of the Administrative Office of the United States Courts and the Chairman of the Administrative Conference of the United States, respectively, under 28 U.S.C. § 2412(d)(5) and 5 U.S.C. § 504(e).

SECTION 10—LIMITATION ON EMPLOYMENT AND COMPENSATION OF OUTSIDE PRIVATE COUNSEL

This section, a new provision in the bill, would impose upon the federal government the same fee cap—\$75 per hour—that the bill would impose upon attorneys' fee awards to parties in litigation with the federal government, or with the states.

Section 3106 of Title 5 of the United States Code currently requires that Executive departments must refer all litigation to the Department of Justice, unless otherwise authorized by law. The Department already has regulations governing the hiring of private counsel in litigation under its authority, and it has consistently limited the payment of private counsel to \$75 per hour. But the Department's regulations now do not reach agencies with independent litigation authority. Where agencies are authorized by law to employ attorneys to conduct litigation, there presently are no statutory restrictions upon the hiring of outside counsel as opposed to staff attorneys, or upon the hourly rates that may be paid. As a result, many agencies presently expend taxpayer dollars on private attorneys at a cost well in

¹⁸ The contrary rule would provide little incentive for parties to settle cases early in the litigation. See Fioretti and Convery, "Attorney's Fees Under The Civil Rights Act—A Time for Change," 16 J. Mar. L. Rev. 261, 277-78 (1983) (discussing earlier cases that had failed to apply the approach of *Marek v. Chesny*).

¹⁹ Aside from the "prevailing party" issue, the present application of § 1988 results in a lack of incentive for plaintiff's attorneys to enter into pre-trial settlements. The more hours the attorney spends on the case, the higher his potential fee award. The motivation then is not to settle, but to proceed to trial, where the hourly rates are even higher.

²⁰ Nor is such a result in the plaintiff's best interests. The purpose of the Civil Rights Act as a whole is to protect those who have suffered a constitutional tort. It naturally follows that if an early settlement is possible, the plaintiff, the protected party under the Act, should be compensated swiftly. However, a plaintiff's attorney, who during the early phase of the litigation has spent relatively few hours in preparation, may lack incentive to settle until compensable hours have reached a significant level. Thus, the overriding goal of the Civil Rights Act is thwarted and litigation is encouraged. The already crowded courts are further congested, so that the taxpayer suffers as well."

¹⁸ As noted by the Supreme Court in *White*, courts currently differ with respect to the time in which attorneys' fees awards must be sought. Id., 455 U.S. at 450 n.9. Before *White*, some courts allowed only 10 days from the time of entry of judgment for filing of fee applications under Fed. R. Civ. P. 59(e); other circuits have imposed no time constraints. The Eighth Circuit has recommended a rule for filing attorneys' fee requests within 21 days after entry of judgment. See *Obin v. District 9, Int'l Ass'n of Machinists*, 651 F.2d 574, 583 (8th Cir. 1981).

¹⁹ A requirement for this type of information is consistent with the District of Columbia Circuit's ruling in *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982), which required detailed documentation by a party seeking an award of attorneys' fees.

²⁰ For example, in some cases fee applications can be resolved immediately following the district court's decision on the merits in order to permit a simultaneous appeal on the merits and of the fee award. This would prevent piecemeal appeals, and might be appropriate where no disagreement existed over the calculation of the award or where the determination required complete familiarity with the record. See *White*, supra, 455 U.S. at 454. In other cases, however, it might be preferable to defer attorneys' fees issues until all appeals have been completed and the plaintiff's entitlement to relief on the merits has been established with finality. This might be appropriate in cases where the determination of attorneys' fees is difficult and likely to consume more time than the appeal on the merits.

excess of the cost of staff attorneys. Other agencies, though, including those with large litigation caseloads such as the Securities and Exchange Commission and the Federal Trade Commission, rely entirely upon staff counsel and do not use outside private counsel.

As part of the overall reform effort of the Legal Fees Equity Act, the bill would make all agencies accountable to the Attorney General with respect to the hiring of outside counsel. This amendment would provide that, notwithstanding any other provision of law, no agency could retain private counsel at the expense of the taxpayers to conduct litigation except in accordance with regulations adopted by the Attorney General. The bill also sets a limit of \$75 on the hourly rate of such attorneys retained by the government and paid from appropriated funds. This provision corresponds to the \$75 limit on the hourly rate on all fee-shifting statutes, so that the taxpayers will pay private agency counsel a rate no higher than would be paid by those same taxpayers to a prevailing plaintiff in a fee-shifting case. (For attorneys directly employed by the federal government, of course, the effective hourly rate would be far less than \$75 per hour.)

This section would amend 5 U.S.C. § 3106. The two existing sentences of § 3106 would be retained largely without change as subsections (a) and (e), respectively. The only change is that the first sentence of present § 3106, which refers to Executive departments and military departments, would be expanded to include a reference to all other agencies including independent agencies, boards, and commissions, to make subsection (a) consistent with the reach of the limitations of subsection (b). Of course, there are many independent agencies, boards and commissions that already have independent litigation authority, and they would not be affected by the change to subsection (a). They would, however, be affected by the limitations of subsection (b), which would apply to the hiring of private counsel at taxpayer expense by any agency, independent or not.

Subsection (b) states the general rule that no agency may retain private counsel at taxpayer expense to handle any litigation except as provided in regulations adopted by the Department of Justice, and that, in any event, such private counsel may not be paid more than \$75 per hour from funds appropriated for agency litigation. This includes any funds appropriated to the agency for litigation or legal services, and the permanent, indefinite appropriation to the Judgment Fund under 31 U.S.C. § 1304. It is not intended to apply, however, to the compensation of counsel on a contingency-fee basis, rather than on an hourly basis, for the collection of debts owed to the federal government, should that practice be authorized by Congress.

Subsection (c) authorizes the Attorney General to promulgate regulations implementing the provisions of this section as amended. The regulations could not raise the overall limit of \$75 per hour in subsection (b)(2) but, subject to that limit, they may take into account different types of litigation and the experience and skill of attorneys. The subsection also contemplates a procedure for an agency, in exceptional circumstances, to apply to the Attorney General for a certification of need to employ outside private counsel, for a particular case or a class of litigation, in circumstances that would not otherwise be permitted by the regulations. This will preserve a measure of flexibility in the hiring of outside counsel in response to unexpected demands. The regulations also provide that the Attorney Gen-

eral may act to coordinate the use and availability of the expertise of the some 17,000 attorneys presently employed by the federal government, in order to promote their more efficient use and to reduce the need for hiring more expensive outside counsel. The bill specifically precludes judicial review of the regulations adopted by the Attorney General under this subsection and the determinations and actions he takes pursuant to those regulations, because judicial review of the Attorney General's supervision of litigation involving the United States would be most inappropriate.

SECTION 11—EFFECTIVE DATE

Section 11 applies the provisions of the bill to any award of attorneys' fees and related expenses incurred subsequent to the enactment of the bill. Further, the provisions of the bill apply to actions commenced prior to enactment, but only for attorneys' fees and related expenses incurred after the date.

Mr. HATCH. Mr. President, in July 1981, the Constitution Subcommittee began a series of hearings to examine the degree to which recent Federal statutes and court opinions have subjected States and municipalities to growing liabilities for awards of attorney fees. Several leading State and local officials testified about the deleterious effects to these unanticipated liabilities. One State attorney general, for instance, noted that:

States have shown that they have paid sometimes 10 times as much money to pay off these attorney fee awards than they had to pay to satisfy plaintiffs.

Hearings on S. 584 and S. 585, Subcommittee on the Constitution, 97th Congress, 1st session 561 (1981).

At the same time, officials in the Reagan administration undertook a review of the need for some standards to govern the award of attorney fees under numerous statutes which, under broadly defined circumstances, shift the entire expense of litigation to the State, local, or Federal Government defendant. The legislation, which I am sponsoring today, the Legal Fees Equity Act, is the product of careful study to develop uniform standards for setting fees at levels sufficient to attract competent counsel without granting windfalls to lawyers.

This careful study has shown that standards for determining eligibility for, and the amount of, attorney fees awarded against Government parties have varied widely from court to court and State to State. This has often resulted in the award of excessive fees. For example, some courts have even used "multipliers" to double or triple an attorney's customary hourly rate when computing the amount of a fee award.

These inconsistent and troublesome results are primarily due to the ambiguity of fee-shifting statutes which provide no uniform standards for the award of attorney fees to a litigant who prevails to some degree in litigation against a government. Judicial and administrative officers are simply left without adequate guidelines in the law to fashion uniform and fair awards. Thus, the Legal Fees Equity

Act is needed to provide standards and procedures for awarding attorney fees in proceedings against the United States as well as State and local governments in cases where Federal statutes allow such awards.

This bill differs in several important respects from S. 2802, the version of this legislation which I sponsored in the 98th Congress. As a result of hearings held on S. 2802, this bill specifically applies to the Independent Counsel statute, 28 U.S.C. 593, and expands the authority of the Attorney General to enforce limits on the hiring of outside counsel by Federal agencies. This bill also differs from S. 2802 in that the portions of S. 2802 which doubled the attorney fee compensation rates for the Criminal Justice Act have already been enacted.

It is noteworthy, however, that disparities between the compensation of attorneys awarded fees in civil actions against the Government and the compensation of attorneys awarded fees for representing indigent criminal defendants. Although the attorneys working under the Criminal Justice Act protect some of our Nation's most vital constitutional rights in criminal trials where life and liberty may be at stake, they still are compensated at levels far below attorneys who are paid under fee-shifting statutes. The Legal Fees Equity Act continues to try to remedy that inequity.

BACKGROUND

Since first established by the Supreme Court in 1796, *Arcambel v. Wiseman*, 3 Dall. 306 (1796), the basic rule in America for the compensation of counsel has been that each party to a judicial proceeding is expected to bear the cost of his own litigation. The Supreme Court ruled in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1974), that Federal courts lacked power to create exceptions to this rule by awarding fees to attorneys who undertook to enforce certain important rights. *Alyeska* makes it clear, however, that Congress may create exceptions to the traditional American rule by statute.

Since 1974 Congress has enacted over 129 fee-shifting statutes. These statutes authorize recovery of attorney fees in cases against State and local governments as well as the Federal Government. Most of these statutes simply grant the court discretion to award reasonable attorneys' fees to the prevailing plaintiff in a suit against a government. These enactments offer little or no guidance as to the limits of judicial discretion, the standards for determining a reasonable fee or the degree of success necessary to satisfy the prevailing requirement. Accordingly, the amount and complexity of litigation to determine the amount of counsel fees under these fee-shifting statutes has increased dramatically. In 1980 alone, the Supreme Court issued nine opinions on the award of attorney fees.

That same year, the Fifth Circuit decided over 50 reported cases on counsel fees.

The Supreme Court reacted to this veritable flood of litigation with the comment that "a request for attorneys fees should not result in a second major litigation." *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1941 (1983). In that same case, Justice Brennan argued that litigation over attorney fees "serves no productive purpose, vindicates no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets." (Id. at 1950.) A hint of the Supreme Court's frustration with the absence of adequate legal standards governing the award of reasonable fees emerges later in Justice Brennan's concurrence: Ultimately—the fee shifting statute's—straightforward command is replaced by a vast body of artificial, judgment-made doctrine, with its own arcane procedures, which, like Frankenstein's monster, meanders its well intentioned way through the legal landscape leaving waste and confusion—not to mention circuit splits—in its wake. (Id. at 1951.)

Not only has the absence of standards for the award of attorney fees clogged the courts, it has also led to exorbitant fee awards. A recent request for fees in Massachusetts is an example of this problem. A zoning law was declared unconstitutional after a lengthy series of appeals. The attorney, who is also a full-time law professor, requested \$331,441 in fees at an effective hourly rate of \$412.50 an hour for his services. The Washington Post issued the following commentary on that case:

High-priced lawyers are just charging much too much—to the point of caricature—and the folks expected to pay their fees should put an end to the practice. Just because well-heeled private clients dole out huge sums doesn't mean that the public should be equally generous. The "prevailing wage" approach that government uses when it is buying services—which is the essence of Professor Tribe's claim—has a superficial appeal. But on closer inspection it reveals elements of a gigantic rip-off. . . . Lawyers—even civil rights lawyers—need at least as much wage restraint as others when it comes to billing the government.

The Post might also have asked how an hourly rate of \$412.50 can be justified alongside the limits of \$20 per hour imposed on attorneys relying on the Criminal Justice Act.

In the absence of adequate computation standards, attorney fee awards have also been subject to the criticism that the award is disproportionate to the degree of success achieved in the underlying case. For instance, in *Skoda v. Fontani*, 646 F.2d 1193 (7th Cir. 1981), the plaintiff was awarded \$1 in damages, but the attorney fee award was awarded over \$6,000. In *Rivera v. City of Riverside*, 679 F.2d 795 (9th Cir. 1982), the plaintiff was awarded \$33,000 in damages, but the attorney fee award was nearly a quarter of a million dollars. The National Association of Attorneys General re-

cently completed an exhaustive report on the award of attorney fees under the fee-shifting statute most often employed against State and local governments. This report gives a comprehensive overview of the problems created by the lack of adequate standards for the award of attorney fees. I would urge each of my colleagues to read this report.

The overall purpose of this proposal is to provide the courts and Federal agencies with greater guidance in implementing Federal fee-shifting statutes. This bill would not deny fees to prevailing attorneys, but would set standards and procedures to ensure that such fees are "reasonable." An important element of the standards proposed by this legislation is a cap of \$75 per hour on attorney fees awarded against the Government in civil judicial or administrative proceedings. This \$75 per hour fee cap is the same rate established in the recently enacted Equal Access to Justice Act, 28 U.S.C. 2412(d) and 5 U.S.C. 504(b). The bill would, therefore, allow courts to compensate private attorneys at a level commensurate with, though still higher than, that received by the Government attorneys they oppose.

In the absence of adequate statutory guidance, some courts have used bonuses and multipliers extensively to escalate awards. Multipliers were justified as compensation for litigating a particular complex case, as a reward for high quality work by the attorney, or as an offset for the riskiness or contingency of the case. In the recent Supreme Court case of *Blum v. Stetson*, — U.S. — (Mar. 21, 1984) (slip op. No. 81-1374), found that these justifications for multipliers "do not withstand examination." (Id. at 9.) The complexity of a case will be reflected in the number of hours expended in preparation. The quality of an attorney's work will be reflected in the customary hourly rate used to compute his award. Contingency is an element of every case brought under these fee-shifting statutes because they require a litigant to prevail in order to qualify for an award. This "prevailing" requirement was enacted by Congress to discourage frivolous or meritless suits. Granting a bonus for risky cases would be at odds with Congress' intent to award fees only for meritorious suits. Thus, where bonuses are used to compensate attorneys who are handling complex or novel cases, the net result is to inflate compensation which has already been adequately provided. Bonuses for contingency defeats a primary purpose of only compensating litigants for meritorious suits. Consistent with the *Stetson* case, this bill would eliminate the use of multipliers and bonuses in an effort to avoid absurdly high awards.

The bill is intended to apply to all awards of attorney fees against the United States and any State or local government. Its provisions apply to, and modify, all Federal fee-shifting

statutes, but do not supersede more restrictive criteria contained in other statutes. This includes awards made under the Equal Access to Justice Act, except certain specified provisions of that act.

Federal fee-shifting statutes generally contain language indicating that such awards are available only to "prevailing parties." Ambiguities have developed concerning when a party has adequately prevailed so as to come within the statutes. For example, *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), adopted a standard which held that if a party had succeeded "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit," while *Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. 1981), held that a party must have been "successful on the central issue as exhibited by the fact that he has acquired the primary relief sought."

The Legal Fees Equity Act, which I am proposing, clarifies this standard by requiring that a party prevail on the merits in order to obtain an award of fees. The bill's standard is neither as lenient as the "some benefit" test nor as strict as the "central issue" test. The relief sought must be "significant," not merely of "some benefit." Moreover an award of attorney fees may not be obtained prior to a final judgment. This latter requirement is not meant to be read so as to preclude interim awards where Congress has authorized them in the various fee-shifting statutes. Neither is the requirement of final disposition intended to preclude recovery of attorney fees where settlement is reached prior to judgment. Such settlements are generally desirable and so long as it can be shown that the party has prevailed on the merits of the relief sought an award of attorneys' fees may still be obtained.

Where a settlement offer is made by government officials and refused by the plaintiff who is unable thereafter to do any better at final judgment, this bill would deny the recovery of attorney fees for services performed subsequent to the refused offer. Such a provision will encourage government officials to make responsible settlement offers and urge complainants to give those offers meaningful consideration. Of course, where refusal is reasonable under the circumstances this provision would not apply.

The bill also provides that the amount of any judgment awarded against the United States, or against a State or local government shall be reduced by the amount of the attorney fees, not to exceed 25 percent of the judgment. This provision ensures that prevailing parties will pay part of their legal expenses from any monetary award. This subsection of the bill is not applicable to specific sections of the Equal Access to Justice Act, to cer-

tain tax cases or where it would result in undue hardship to the party.

Due to the protracted nature of some litigation, a claim may be rendered moot by State or Federal legislation enacted prior to judicial resolution of the conflict. Under existing case law such a turn of events would not preclude a recovery of attorneys' fees where a court determined that the case was a catalyst for the legislative change. See, e.g., *Maier v. Gagne*, 448 U.S. 122 (1980). This judicial doctrine, however, involves the courts in the rather difficult and unpredictable process of determining that a particular court action was the catalyst for a legislative enactment. As my colleagues understand, legislators rarely have the same things in mind when voting for a particular bill. A judicial inquiry into legislative motives is difficult at best. The Legal Fees Equity Act provides a standard for determining when a case provides such a catalyst by requiring that the litigation be a "material factor" in the legislative change. This provision would permit legislators and other State officials to proceed with policy changes without fear of incurring costly litigation expenses because some pending suit peripherally relates to their actions.

Finally, the bill contains several other provisions for timely application and uniform procedures to be followed in seeking recovery of attorney fees. The provisions of this bill would apply to all cases commenced subsequent to enactment as well as to those commenced prior to enactment respecting that amount of the attorney fees and expenses incurred following the date of enactment.

Mr. President, the sparsity of guidance given by the terse language of the myriad fee-shifting statutes is perhaps itself sufficient evidence that some clear standards are necessary to govern the award of attorney fees. Moreover the need to provide greater balance between the attorney fees policies applicable to lawyers representing indigent criminal defendants and those applicable to lawyers who sue governments civilly argues for the Legal Fees Equity Act.

Along with a copy of the Legal Fees Equity Act, I ask that the report of the National Association of Attorneys General, and the Washington Post editorial from December 16, 1983 be included in the RECORD following my remarks.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[Report to Congress—From the National Association of Attorneys General]

CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

FOREWORD

... [O]ne of the least socially productive types of litigation imaginable [is] appeals from awards of attorney's fees...

Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane

procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake.

Hensley v. Eckerhart, 103 S. Ct. 1933, 1944, 1951 (1983) (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).

The only truly consistent thread that runs through federal court decisions on attorney's fees is their lack of consistency.

II]nordinately high fee awards in some cases, and the absence of a coherent rationale for justifiably large awards in other cases, have lent support to the sentiments of the Italian proverb that "a lawsuit is a fruit tree planted in a lawyer's garden."

Berger, *Court Awarded Attorney's Fees: What is "Reasonable"?*, 126 Pa. L. Rev. 281, 292 (1977).

As the foregoing comments suggest, courts and commentators alike have become critical of attorney's fees litigation. Since passage of the Civil Rights Attorney's Fees Awards Act of 1976, one constant voice expressing concern has been that of the National Association of Attorneys General, which has continuously monitored the implementation and effect of the Act. On the basis of its collective experience, the Association has become increasingly concerned that the Act, as interpreted and applied by the courts, is operating contrary to its original purpose. Rather than simply facilitating access to the courts for disadvantaged victims of civil rights violations, a purpose that the Association wholeheartedly endorses, the Act has had the unintended effects of encouraging frivolous noncivil rights claims, deterring settlement of meritorious claims, awarding fees to plaintiffs who do not actually prevail, conferring unreasonable "wind-fall" fees on plaintiffs' counsel, draining public treasuries, and fostering an avalanche of litigation on attorney's fees that threatens to bury the underlying civil rights claims that the Act was intended to vindicate.

In this report, the Association outlines and documents these adverse and unintended applications of the Act and recommends the enactment of statutory standards that would restore the Act to its original purpose, provide needed guidance to the courts and the bar, and mitigate the possibility of abuse. In particular, the Association recommends that the Act be amended to apply solely to true civil rights cases; to define "prevailing party" in a realistic manner; to restore and guide judicial discretion to award or deny fees; to provide workable standards for computing a "reasonable" fee; to impose a ceiling on the hourly rates at which attorneys may be compensated; to prohibit the award of "bonuses" in excess of reasonable compensation for time reasonably spent by prevailing counsel; and to provide additional incentives for settlement.

This report begins with an outline of the Association's findings and recommendations, which is followed by a discussion and analysis of the basis for each finding and recommendation. After documenting the magnitude of the problem created by the lack of coherent and workable standards (Finding and Recommendation No. 1), the report makes specific findings and recommendations concerning the scope of the Act (Finding and Recommendation No. 2), the standard for determining a party's eligibility for fees (Findings and Recommendations Nos. 3, 4, and 5), and the standard for calculating a "reasonable" attorney's fee (Findings and Recommendations Nos. 6, 7, and 8). Finally, the report discusses the adverse impact of the Act on the process of dispute resolution both in and out of court, and rec-

ommends how that problem could be alleviated by legislative reform (Finding and Recommendation No. 9).

The various recommendations contained in this report are not intended to discourage or inhibit victims of civil rights violations from redressing their grievances through litigation. Rather, the intent of these recommendations is to turn the focus of civil rights litigation away from fee disputes and return it to the aggrieved parties whose rights the Act was intended to vindicate. This report does not take issue with the Congressional determination that a public entity that violates a person's civil rights should be burdened with having to pay attorney's fees necessary to prove such a violation. However, the process for awarding fees, the amounts of fees awarded, and the underlying claims must be viewed in light of the purposes of the original Act. As indicated by the findings contained in this report, the Act is operating contrary to its original purposes. Legislative action, along the lines recommended in this report, is urgently needed.

RESOLUTION

In plenary session on June 25, 1983, the Association adopted the following resolution:

Whereas, litigation under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is expanding at an alarming rate with further expansion in the future a near certainty; and

Whereas, lack of meaningful standards to determine what is a "reasonable" attorney's fee in any given case consistently results in exorbitant court-ordered fee awards paid from public treasuries of state and local governments and creates additional problems for public defendants; and

Whereas, cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of collateral attorney's fees requests when, in fact, they have not prevailed in any meaningful sense on the merits of their claim; and

Whereas, the reported Fees Act opinions so narrowly circumscribe the ability of lower courts to determine when special circumstances exist that justify outright denial of requested fees that the discretion expressly contemplated by the Fees Act itself can rarely be exercised at all; and

Whereas, a special subcommittee chaired by Attorney General Kenneth Eikenberry has studied abuses under 42 U.S.C. § 1988 and has compiled its findings into [this] Report;

Now, therefore, be it resolved, that the National Association of Attorneys General:

1. Urges the Congress to adopt legislation that will eliminate these and other related problems that have resulted from abuses under 42 U.S.C. § 1988;

2. Commends Attorney General Eikenberry and members of the Subcommittee for the diligent work on this matter and adopts the Report as part of the Association's policy position; and

3. Authorizes its General Counsel to transmit these views to the appropriate members of the Administration and Congress.

INTRODUCTION

A. Purpose of the Civil Rights Attorney's Fees Award Act

The Civil Rights Attorney's Fees Awards Act of 1976 was passed in direct response to

the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that federal courts do not have the power to award attorney's fees to a prevailing party without express statutory authorization.¹ Prior to *Alyeska*, federal courts had been awarding attorney's fees to the prevailing party in civil rights cases on the theory that, in bringing such cases, plaintiffs serve in the capacity of "private attorneys general," seeking to vindicate constitutional rights, not for themselves alone, but also for the benefit of others similarly situated. By holding that the federal courts lack authority to award fees under such circumstances, *Alyeska* "created anomalous gaps in our civil rights laws," which the Act was intended to fill.²

The Act was thus intended to remove financial barriers that would otherwise prevent access to the courts by disadvantaged plaintiffs acting in the role of private attorneys general, by affording successful civil rights plaintiffs "the opportunity to recover what it costs them to vindicate these rights in court."³ Such a measure was viewed as desirable in order to enforce "major civil rights laws,"⁴ protecting the most "basic" and "fundamental" civil rights.⁵

As a "narrowly drawn" response to *Alyeska*,⁶ the Act was not intended as a wholesale abrogation of the "American Rule" that each party must bear its own litigation costs. Rather, it was viewed by its proponents as "only a first step and a rather limited and cautious one."⁷ The proponents of the Act repeatedly emphasized its limited purpose by reiterating that the Act was not intended to "aid [] lawyers,"⁸ encourage meritless litigation,⁹ or provide "windfalls" to prevailing counsel.¹⁰ Rather, Congress stressed the Act's relatively moderate approach of authorizing courts, in their discretion, to award a "reasonable" attorney's fee to prevailing parties in certain civil rights cases, in contrast to that of more liberal statutes providing for mandatory fee awards or awards to nonprevailing parties.¹¹

B. Good intentions gone awry: A need for legislative action

As will be shown in this report, the good intentions of Congress outlined above have not been realized. Rather than simply facilitate the vindication of meritorious civil rights claims, as Congress intended, the Act has operated to foster a flood of litigation on the entitlement to and amount of attorney's fees. Rarely has a federal statute had the immediate and explosive impact on litigation involving state officials as has this Act. Particularly after *Maine v. Thiboutot*, 488 U.S. 1 (1980),¹² it has become routine for all governmental litigation—from the most complex class actions for institutional reform to the most commonplace complaints for state judicial review of administrative decisions—to include requests for attorney's fees under the Act. Not surprisingly, the soaring number of attorney's fees claims is reflected in the burgeoning amount of litigation engendered by the Act itself.

These developments are both undesirable and unnecessary. One can hardly conceive of a less socially valuable use of resources than fees litigation.¹³ State and federal taxpayers are now routinely subjected to the spectacle of publicly-funded counsel making claims for fees to be paid by publicly-funded agencies, defended by publicly-funded attorneys general, and decided by publicly-funded courts. While no single participant in these exercises is exclusively responsible, it is the Association's firm belief that the lack of statutory standards governing the application for and adjudication of fee

awards has unnecessarily encouraged unreasonably high requests, stymied settlement efforts, forced these matters into litigation, and permitted inconsistent, excessive, and ever-escalating fee awards. This chain of events has caused an outcry by the bench, the bar, and the tax-paying public for legislative reform.

The Association therefore urges the Congress to enact clear standards of eligibility for and computation of fee awards under the Act, in accordance with the recommendations contained in this report. Provision for such standards would render the application of the Act more consistent and, hence, more reasonable, to the mutual benefit of civil rights plaintiffs, state taxpayers, and the judiciary. Greater certainty would promote settlement, reduce fee litigation, and thereby permit counsel and the courts to devote more attention to substantive matters.

The Association wishes to emphasize that it endorses the salutary purpose of the Act and is committed to the Act's concept of reasonable fees to prevailing parties in civil rights cases. The recommendations contained in this report are intended to further the Act's original purpose while eliminating its unintended and undesirable side-effects.

FINDINGS OF THE ASSOCIATION

Finding No. 1: Litigation under the Fees Act is expanding at an alarming rate with further expansion in the future a near certainty.

Finding No. 2: The Act, as interpreted and applied by the courts, makes attorney's fees available not only in civil rights cases but in virtually all cases against state and local governments or officials.

Finding No. 3: Cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of attorney's fees awards when, in fact, they have not prevailed, in any meaningful sense, on the merits of their claims.

Finding No. 4: In cases where the requesting party has, in fact, prevailed to some extent, attorney's fees awards under the Act are frequently disproportionate to the degree of success actually achieved.

Finding No. 5: The Fees Act, as interpreted and applied by the courts, makes the award of fees to a prevailing party virtually mandatory, thereby eliminating the "discretion" expressly granted to the courts by the Act.

Finding No. 6: Lack of meaningful standards for determining what constitutes a "reasonable" attorney's fee in any given case results in inconsistent and often excessive fee awards and makes it difficult to settle claims for attorney's fees.

Finding No. 7: Courts routinely make "bonus" awards or apply "multipliers" to the hourly rates set for prevailing counsel, resulting in grossly inflated awards constituting a "windfall" to prevailing counsel.

Finding No. 8: In applying the Fees Act to prevailing parties represented by publicly-funded salaried attorneys, courts normally award fees based on hourly rates charged by private counsel, resulting in windfalls that substantially exceed the actual cost of the litigation.

Finding No. 9: The Fees Act affects the process of legal dispute resolution in a way that is unfair to public defendants and that further burdens the courts by:

A. making it more desirable for plaintiffs to commence litigation, rather than settle disputes informally;

B. making it more advantageous for plaintiffs to continue litigation rather than settle where any meritorious claim is presented;

C. making it less desirable, once litigation is underway, for public defendants to alter

challenged laws, administrative regulations, or official positions in any way that favors the plaintiffs;

D. making it less desirable for public defendants to litigate those close issues that should be litigated; and

E. making it difficult for plaintiffs and defendants to settle claims for attorney's fees.

RECOMMENDATIONS OF THE ASSOCIATION

Recommendation No. 1: The Congress should amend the Act, as specified in the further recommendations enumerated hereunder, to provide clear and precise standards governing eligibility for and computation of attorney's fees awards under the Act.

Recommendation No. 2: The Congress should amend the Fees Act to apply only to civil actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right secured by a provision of the Constitution of the United States or an Act of Congress providing for individual civil rights of citizens or of all persons within the jurisdiction of the United States.

Recommendation No. 3: The Congress should amend the Fees Act to require that, in order to be eligible for a fee award, a party must clearly and substantially prevail on the merits of each issue or claim as to which fees are being sought.

Recommendation No. 4: The Congress should amend the Fees Act to require that courts apportion the amount of fee awards to the degree of success actually attained by the prevailing party.

Recommendation No. 5: The Congress should amend the Fees Act to provide expressly that a court may deny fees where, in the court's view, denial is appropriate, including, but not limited to, cases in which the court determines:

A. that the defendant's position was substantially justified or advanced in good faith; or

B. that an award of fees would not further the substantive purposes of the Act.

Recommendation No. 6: The Congress should amend the Fees Act to provide that the prevailing party shall not be awarded fees in excess of \$75 per hour.

Recommendation No. 7: The Congress should amend the Fees Act to prohibit the award of bonuses or multipliers in excess of compensation at a reasonable hourly rate for the number of hours reasonably spent by prevailing counsel.

Recommendation No. 8: The Congress should amend the Fees Act to provide that, where the prevailing party is represented by a publicly-funded legal services organization, courts should compute a reasonable hourly rate for such counsel based on the actual costs of the litigation to the organization, including the proportion of the attorney's annual salary and of the organization's annual overhead attributable to the number of hours reasonably spent on the case.

Recommendation No. 9: The Congress should amend the Fees Act to provide that the court shall deny attorney's fees to a prevailing party, where it determines:

A. that the lawsuit was brought principally for the purpose of obtaining attorney's fees; or

B. that the prevailing party rejected an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, or a cognate state rule of procedure, that was more favorable than the relief ultimately granted by the court, in which case no fees shall be awarded for the services rendered after the date of the offer.

DISCUSSION OF FINDINGS AND
RECOMMENDATIONS

Finding No. 1: Litigation under the Fees Act is expanding at an alarming rate with further expansion in the future a near certainty.

Since the inception of the Act in 1976, litigation on eligibility for and computation of attorney's fees has mushroomed. The number of reported cases involving attorney's fees is tremendous. West's annotations to 42 U.S.C. § 1988 now fill 179 closely printed pages.¹⁴ A computer search for cases arising under § 1988 revealed almost 3,000 federal and state decisions as of December 1983. The advance sheets routinely report numerous attorney's fees cases each week; and the Supreme Court decides fee cases every term, while declining to review many more. Indeed, in just one month in 1980, the Court rendered six major attorney's fees decisions.¹⁵

This explosion of fee litigation has engendered numerous law review articles,¹⁶ and several treatises on the subject,¹⁷ as well as a bi-monthly newsletter designed to keep attorneys apprised of current developments in the area of attorney's fees.¹⁸ As noted by Lloyd Cutler,¹⁹ in his Foreword to a recent three-volume treatise on court-awarded attorney's fees, this Act and other similar fee-shifting statutes "have created a new field of law that has grown so fast and become so complex that it has baffled the efforts of courts and lawyers to comprehend and apply it."

The vast amount of litigation on attorney's fees has led the courts to complain that "the fee proceedings have become the main event rather than the side show" such that "the [attorney's fees] tail is wagging the [civil rights] dogs."²⁰ The Supreme Court has added its voice to this mournful chorus, recently stating that "a request for attorney's fees should not result in a second major litigation."²¹ Other concurring and dissenting justices in the same case characterized fee litigation as "one of the least socially productive types of litigation imaginable" and bemoaned the fact that "[s]uch appeals [from fee awards], which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988."²² Those justices went on to state that:

Congress enacted § 1988 . . . not to spawn litigation, however interesting, over [attorney's fees]. . . . In systemic terms, attorney's fees appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate.

Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake.²³

As the above quotation indicates, the flood of litigation under § 1988 has done little to resolve the many questions arising from its implementation. Very few hard and fast rules have developed, and conflicts exist not only among circuits but often among the district courts or panels of a single circuit.²⁴ As a result of this continuing confusion, litigation in this area will undoubtedly continue to expand. For example, as indicated by the numerous lower-court majority and dissenting opinions citing or "explaining" *Hensley v. Eckerhart*,²⁵ the Supreme Court's latest "pronouncement" on § 1988, that case, like many of its predecessors, has apparently raised as many questions as it has answered.

Apparently, the confusion over the proper interpretation and application of § 1988 can be resolved only by the Congress. As noted by one commentator,

Because [fee-shifting] is contrary to two hundred years of experience in American federal courts, the cases have been difficult for lawyers and judges alike. Understanding has not been materially helped by Congress which has frequently passed attorney fee provisions with . . . only minimal or inconsistent direction how the measures are to be interpreted and applied.

Derfer & Wolf, *supra* at ix. Only by setting clear statutory standards for the application of the Act can the rising tide of needless litigation be stemmed.

Recommendation No. 1: The Congress should amend the Act, as specified in the further recommendations enumerated hereunder, to provide clear and precise standards governing eligibility for and computation of attorney's fees awards under the Act.

Finding No. 2: The Act, as interpreted and applied by the courts, makes attorney's fees available not only in civil rights cases but in virtually all cases against state and local governments or officials.

The proponents of § 1988 touted the Act, as its name implies, as a measure designed to protect "basic" and "fundamental" civil rights by encouraging private enforcement of our "major civil rights laws," including § 1983.²⁶ Although there is strong evidence that Congress viewed § 1988 as a civil rights measure,²⁷ the Supreme Court subsequently held in *Maine v. Thiboutot* that fees are available not only in civil rights cases but in any action under § 1983, which the Court construed to include cases arising under any federal statute or constitutional provision.²⁸ In response to the state's argument that such a construction is contrary to legislative intent, the Court suggested that "[t]hat argument . . . can best be addressed to Congress, which, it is important to note, has remained quiet in the face of our many pronouncements on the scope of § 1983."²⁹ In his dissenting opinion in *Maine v. Thiboutot*, Justice Powell predicted that the Court's decision would "dramatically expand the liability of state and local officials and may virtually eliminate the 'American Rule' in suits against those officials." In Justice Powell's prescient view, the

[P]ractical effect [of the majority opinion] means that state and local governments, officers and employees now face liability whenever a person believes that he has been injured by the administration of any federal-state cooperative program, whether or not that program is related to equal or civil rights.

. . . [I]ngenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant.³⁰

Even at that time, Justice Powell observed that "[t]here is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought."³¹

Unfortunately for state governments and their taxpayers, Justice Powell's prediction has now become a painful and expensive reality. Fees are now routinely sought and awarded in even the most routine state court reviews of administrative agency decisions, having little or no bearing on civil or equal rights. For example, the Supreme Judicial Court of Massachusetts ruled that a plaintiff who succeeded in obtaining a reversal of an administrative decision, thereby obtaining \$250 toward the purchase of a washing machine, was entitled to attorney's fees under § 1988. The court reasoned that since the plaintiff's complaint contained a claim, not reached by the court, that the

regulation in question violated the Equal Protection Clause of the United States Constitution (by discriminating between those who have broken-down washing machines and those who have none), a claim which the court viewed as "substantial," the action was one to enforce the provisions of § 1983, thereby invoking the fee-shifting provisions of § 1988.³²

The *Stratos* case illustrates another related problem that has arisen under § 1988. Relying on statements in the legislative history of the Act that, in cases containing both § 1983 and non-§ 1983 claims, if the § 1983 claim meets the "substantiality" test articulated in *Hagans v. Lavine*, 415 U.S. 528 (1974), then attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim,³³ courts have often awarded fees where the § 1983 claim is weak, but not "obviously frivolous," "absolutely devoid of merit," or "wholly insubstantial."³⁴ As noted by Justice Rehnquist in his dissenting opinion in *Hagans*, the substantially test is met whenever the "plaintiff is able to plead his claim with a straight face."³⁵ The effect of that test is therefore to stand the concept of federalism on its head by "federalizing" nearly all claims against state or local officials.³⁶

The application of the substantiality test to § 1988 means that plaintiffs can recover fees under § 1988, even when they lose on their federal civil rights claims. For example, in *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977), the district court had ruled in plaintiff's favor on state law grounds but had ruled against him on his § 1983 claim. Nevertheless, the Sixth Circuit held that plaintiff was entitled to fees under § 1988, since his claim under § 1983 was "substantial."

Clearly, in enacting § 1988, Congress did not intend to encourage litigants to pad their meritorious state law complaints with weak or meritless civil rights claims, in order to obtain fees under § 1988. Yet, that is the net effect of the case law discussed above. Congress must therefore act to clarify its original intent that § 1988 be used to enforce our most basic and fundamental civil rights. The Association is concerned that the statute not be revised so as to impair individuals seeking full redress for violations of their civil or equal rights. However, the Association believes that a restoration of the scope of the Act to pre-*Thiboutot* coverage is necessary.

In so acting, Congress will be able to answer a number of nagging questions concerning the proper scope of the statute: should it apply to cases brought by corporations or other business entities? Should it apply to all cases raising constitutional questions? One case that raises these questions and has already sparked considerable public criticism is *Grendel's Den v. Larkin*, No. 77-3418-T (D. Mass.). In that case, Harvard Law School Professor Lawrence Tribe is seeking almost \$350,000 in attorney's fees and costs for his successful efforts to obtain a liquor license for a restaurant in Harvard Square. Although the Supreme Court's decision on the merits of that case was based on the Due Process and Establishment Clauses of the United States Constitution, it is unlikely that this liquor license matter is the type of case that Congress had in mind when it enacted § 1988 as a means of protecting disadvantaged victims from violations of their most basic human rights.³⁷

Recommendation No. 2: The Congress should amend the Fees Act to apply only to civil actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any

right secured by a provision of the Constitution of the United States or an Act of Congress providing for individual civil rights of citizens or of all persons within the jurisdiction of the United States.

Finding No. 3: Cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of attorney's fees awards when, in fact, they have not prevailed, in any meaningful sense, on the merits of their claims.

Although the Act expressly provides that only a "prevailing" party may be awarded fees, the application of this provision by the courts to cases where parties have not prevailed in any meaningful sense has effectively eliminated the prevailing party requirement, contrary to the express language of the statute and the underlying Congressional intent. In numerous cases where judgment was rendered for the defendant, courts have nevertheless viewed the plaintiff as a prevailing party for purposes of § 1988 fee awards. For example, in *NAACP v. Wilmington Medical Center, Inc.*, 689 F.2d 1161 (3rd Cir. 1982), cert. denied, 103 S. Ct. 1499 (1983), the district court dismissed plaintiffs' claims against the state and federal defendants and, after trial, held that plaintiffs had failed to prove discrimination by the Wilmington Medical Center and accordingly entered judgment for the defendants and denied plaintiffs' request for fees. On appeal, the Third Circuit reversed the denial of fees, stating that "[t]he fact that a judgment was ultimately entered in favor of [the defendant] does not make the plaintiffs any less the prevailing party."³⁸ The court ruled that plaintiffs had "prevailed" since they had obtained "some of the benefits sought by the litigation," even though the actual "benefits" obtained, by means of an agreement between the state and federal defendants, had been vigorously but unsuccessfully opposed by the plaintiffs in the litigation.³⁹

Similarly, in *Dayan v. Board of Regents*, 620 F.2d 107 (5th Cir. 1980), the Fifth Circuit affirmed the district court's ruling for the defendant on the merits, that the defendant's "rational procedural policy violates neither the First Amendment nor the Fourteenth Amendment to the United States Constitution," yet also affirmed an award of fees to the plaintiffs on the ground that they had obtained "substantial voluntary relief as a direct result of their lawsuit."⁴⁰ Another example of an award of fees to a losing party appears in *Ross v. Horn*, 598 F.2d 1312 (3rd Cir. 1979), cert. denied, 448 U.S. 906 (1980), in which the appellate court remanded the case for a re-determination of plaintiffs' eligibility for fees while, at the same time, affirming the district court's holding that the procedures employed by the defendant in processing suspected unemployment fraud cases adequately protected plaintiffs' statutory and constitutional due process rights.

In a number of cases, plaintiffs have been awarded fees where the benefits sought in their complaint were obtained by legislative action before a final judicial decision could be rendered on the merits. For example, in *DeMier v. Gondles*, 676 F.2d 92 (4th Cir. 1982), plaintiffs who voluntarily dismissed their claim after the state legislature enacted a statute that achieved the object of the suit were awarded fees, even though other complaints may have contributed to the change in policy.⁴¹

A striking example of the inequities that can result is *Institutionalized Juveniles v. Secretary of Public Welfare*, 568 F. Supp. 1020 (E.D. Pa. 1983). There, defendants had prevailed in the United States Supreme Court on what the District Court recognized were the central issues of the case. *Secretary*

of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979). Nonetheless, the District Court awarded almost \$90,000 in fees, including a 50 percent multiplier, based on its view that various regulatory and statutory changes during the period of litigation provided some of the plaintiffs with some of the benefits they sought. An appeal is pending.

Although the legislative history of § 1988 indicates that the term "prevailing party" is to be read broadly to include cases that end in a consent decree or out-of-court settlement, "none of the cases cited in the House or Senate Reports involves a fee award in the context of such a remote and extra-judicial resolution of a lawsuit as legislative pre-emption."⁴² Furthermore, even if such a result had been intended by the enactors of § 1988, the problems involved in determining whether and to what extent a particular lawsuit acted as a "catalyst" for legislative change, make the application of the "prevailing party" standard to cases mooted by legislative action judicially unworkable. Since legislators act from multifarious motives, it is difficult, if not impossible, to determine the impact of a particular lawsuit on a legislative body as a whole.⁴³ Moreover, as recognized by one court, even attempting to make such a determination "might constitute an impermissible inquiry into legislative motive."⁴⁴

Cases resolved by settlement present similar problems. For example, in *Young v. Kenley*, 641 F.2d 192 (4th Cir. 1981), the Fourth Circuit reversed a denial of attorney's fees to a plaintiff who alleged discrimination in the denial of a position for which she had never even applied. Once plaintiff applied for the position, after being urged to do so by the defendants and the district court, she passed the required test and was given the position in question, and the case was settled on that basis. Over the strong dissent of Justice Rehnquist, joined by Justice O'Connor, the Supreme Court denied a petition for a writ of certiorari on the prevailing party issue.⁴⁵ In his dissent from the denial of certiorari, Justice Rehnquist suggested that an award of fees in such circumstances "seems largely to disregard the central purpose of § 1988 [—] . . . to 'enforce' the civil rights laws or to . . . promote[] their policies for the benefit of the public at large," and indicated that fees should not be awarded "if the discernible benefit was conferred gratuitously by the defendant or was taken simply to avoid further litigation expenses."⁴⁶ Nevertheless, on remand, the district court ultimately awarded fees in an amount exceeding \$30,000.

Thus although Congress stressed that § 1988, unlike other more liberal fee provisions, was intended to apply only where a party has "prevailed,"⁴⁷ that intent has been undercut by subsequent court decisions construing the term "prevailing" so broadly as to include cases where the party awarded fees has actually lost the case on the merits or failed to succeed in any meaningful sense. Congress must therefore reassert its initial intent in a manner that will prevent such perversions of the statute's seemingly straightforward prevailing party requirement.

Recommendation No. 3: The Congress should amend the Fees Act to require that, in order to be eligible for a fee award, a party must clearly and substantially prevail on the merits of each issue or claim as to which fees are being sought.

Finding No. 4: In cases where the requesting party has, in fact, prevailed to some extent, attorney's fees awards under the Act are frequently disproportionate to the degree of success actually achieved.

In many cases, large amounts of fees have been awarded, despite the fact that the plaintiff received only nominal relief on the merits. For example, in *Skoda v. Fontani*, 646 F.2d 1193, 1194 (7th Cir. 1981), the court held that plaintiffs, who won a jury verdict of only one dollar on their civil rights claim, for which they had claimed \$200,000 in damages, were "prevailing parties," contrary to the district court's conclusion. On remand, the district court reluctantly awarded plaintiffs \$6,086.12 in fees and costs.⁴⁸ Similarly, in *Milwe v. Cuvuoto*, 653 F.2d 80, 83-84 (2d Cir. 1981), the court held that "the one dollar assessed against [the defendant] on plaintiff's constitutional claim would be sufficient to support an award of fees under the Act."

Another case in which the amount of fees awarded was grossly disproportionate to the degree of success on the merits is *Rivera v. City of Riverside*, 679 F.2d (9th Cir. 1982), in which the Ninth Circuit found no abuse of discretion in the district court's award of \$243,343.75 in fees incurred in obtaining a jury verdict of \$33,350. An even more extreme example of a court's failure to proportion a fee award to the degree of success obtained is the decision reached in *Haygood v. Younger*, No. S-75-739LKK (E.D. Cal. 1983), a case in which plaintiff alleged illegal confinement in a state prison. The complaint named sixteen defendants and alleged nineteen separate causes of action. After five years of pre-trial proceedings, eleven defendants were dismissed or granted summary judgment, and seventeen causes of action were dismissed. Three defendants were granted a directed verdict after the plaintiff's case in chief. The jury returned a verdict of \$640 against one of the remaining defendants and \$1,450 against the other. The plaintiff then sought \$75,968.75 in attorney's fees. Included was a demand for \$17,831.25 in "paralegal fees" for assistance claimed to have been provided by the plaintiff's inmate advisor. The defendants' request for discovery and for an evidentiary hearing to contest the fee request were both denied by the court. The court then awarded \$45,383.17 in attorney's fees, including \$9,900 in paralegal fees for the inmate advisor. The award was apparently reduced from the amount originally requested only because counsel's representation had been of poor quality and the hours claimed had been "padded."

The effect of such decisions is to encourage civil rights plaintiffs to pad their complaints with multiple, meritless claims, "secure in the knowledge that any tactic reasonably related to his cause will be compensable."⁴⁹ Not only is the "penalty" incurred by the defendant in such cases disproportionate to the jury inflicted, but such results also operate to the disadvantage of plaintiffs (as opposed to their counsel). Plaintiff's counsel, who can expect to be compensated for time spent on all claims, if he prevails to any extent, has no incentive to settle a case in the early stages of litigation, but rather is encouraged to litigate every claim to the maximum extent. Aggrieved plaintiffs are thereby deprived of the benefit of an early settlement, and courts, as well, are subjected to congested dockets.⁵⁰

The Supreme Court's recent decision in *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983), directing the lower court to reconsider the amount of its fee award in light of the extent of success achieved by the plaintiffs, is a step in the right direction, but it will not resolve all of the problems discussed above and may raise additional ones. For example, it remains to be seen how the lower courts will resolve the apparent contradic-

tion between the Court's directive that, in cases where plaintiffs only partially succeed, the "results obtained" may warrant a downward adjustment in the amount of fees awarded,⁵¹ with its caveat that "[w]here a plaintiff has obtained excellent results . . . the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit."⁵² Rather than "clarify the proper relationship of the results obtained to an award of attorney's fees," as the *Hensley* case purports to do,⁵³ it will undoubtedly generate further litigation on what constitutes an "unrelated claim" or "excellent results."⁵⁴ As stated by Justice Brennan in his concurring and dissenting opinion in *Hensley*, "Regular appellate scrutiny of issues like those in this case . . . generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after."⁵⁵ Indeed, in post-*Hensley* cases in the lower courts, *Hensley* is relied upon by fee applicants and opponents alike and is cited in both majority and dissenting opinions,⁵⁶ indicating that additional legislative guidance is needed on the propriety of apportioning the amount of fees awarded to the degree of success attained by the prevailing party.

Recommendation No. 4: The Congress should amend the Fees Act to require that courts apportion the amount of fee awards to the degree of success actually attained by the prevailing party.

Finding No. 5: The Fees Act, as interpreted and applied by the courts, makes the award of fees to a prevailing party virtually mandatory, thereby eliminating the "discretion" expressly granted to the courts by the Act.

The proponents of the Fees Act emphasized the discretionary nature of the Act, which expressly provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee" (emphasis added), and contrasted that Act with other statutes requiring that fees be awarded to a prevailing party.⁵⁷ However, the Senate Report suggested that, in exercising their discretion, courts should apply the standard articulated by the Supreme Court in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), i.e., that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

That standard, which has become known as the *Newman* standard, "was initially used by the courts to explain or justify the mandatory imposition of fees."⁵⁸ Application of such a standard is appropriate where the purpose of the fee provision is "to encourage suit or to provide an incentive to litigate,"⁵⁹ not where the provision in question was enacted "mainly for the purpose of preventing the cost of litigation from deterring a suit."⁶⁰ Since the purpose of § 1988, as articulated by its proponents, was not to encourage litigation, but rather "to insure the high cost of litigation does not bar the federal court to citizens who seek to enforce their rights under our civil rights laws,"⁶¹ the rationale underlying the *Newman* standard is inapplicable to § 1988.

Despite the incompatibility of the *Newman* standard with the overall purpose of the Act, and although Congress chose not to use the *Newman* language in § 1988,⁶² most courts, in reliance on the Senate Report, interpret § 1988 in a manner contrary to its express language.⁶³

The practical effect of the application of the *Newman* standard to § 1988 is to make the award of fees to a prevailing party mandatory, since courts have rejected virtually every "special circumstance" proffered by defendants as a justification for denying

fees.⁶⁴ Among the special circumstances that have been rejected by appellate courts as rendering an award of fees unjust are defendants' good faith,⁶⁵ defendants' reliance on previous court orders or government regulations,⁶⁶ that defendants' refusal to expend funds was based on lack of legislative appropriation,⁶⁷ that defendants were compelled by law to engage in the challenged conduct,⁶⁸ that plaintiff received only nominal damages,⁶⁹ that the fee award would be paid by a public entity and would thereby impair that entity's ability to provide further services,⁷⁰ that plaintiffs were able to afford counsel,⁷¹ that plaintiffs refused to settle,⁷² and that the suit did little or nothing to further civil rights.⁷³ Even the fact that the plaintiff committed perjury during trial has been rejected as a special circumstance justifying a denial of fees.⁷⁴

As a result, one judge has described the application of the special circumstances exception by the courts as

[R]ender[ing] [the exception] in effect a nullity. This interpretation is reminiscent of the passage wherein Macbeth remarked, "Life is but a walking shadow; . . . a tale told by an idiot, full of sound and fury, signifying nothing."⁷⁵

Moreover, where fees are awarded despite the fact that, for example, the defendant acted in good faith, the plaintiff obtained only nominal damages, and the action did nothing to further civil rights, "a question arises as to what goals of the Attorney's Fees Act, if any, are being furthered."⁷⁶ In such cases, "the only true victor may be the plaintiff's attorney."⁷⁷

Furthermore, given the prospect of a mandatory fee award if he prevails, plaintiff's counsel has no incentive to enter into a pre-trial settlement. The more time he spends on the case, the higher his potential fee award. The motivation to proceed to trial is therefore enhanced, and the incentive to settle, diminished.⁷⁸

Therefore, in order to restore the judicial discretion expressly intended by the Act, but virtually eliminated in its application, Congress should amend the Act to specify circumstances in which the courts' discretion may be exercised to deny fees. Such an amendment would not only further the original purpose of the Act, but would also be consistent with the standard applicable to fee awards against federal defendants under the Equal Access to Justice Act, which expressly provides that fees are not to be awarded when the government has demonstrated a substantial justification for its position.⁷⁹ Since the purpose of the Equal Access to Justice Act, as set forth in its legislative history,⁸⁰ is parallel to that of the Fees Act, there is no reason why state and local defendants should not share the protection, enjoyed by federal defendants under the Equal Access to Justice Act, from the imposition of unjust awards of attorney's fees.

Recommendation No. 5: The Congress should amend the Fees Act to expressly provide that a court may deny fees where, in the court's view, denial is appropriate, including, but not limited to, cases in which the court determines:

A. that the defendant's position was substantially justified or advanced in good faith; or

B. that an award of fees would not further the substantive purposes of the Act.

Finding No. 6: Lack of meaningful standards for determining what constitutes a "reasonable" attorney's fee in any given case results in inconsistent and often excessive fee awards and makes it difficult to settle claims for attorney's fees.

At the time Congress enacted the Fees Act, the pertinent House and Senate Re-

ports indicated that the appropriate standards for determining what constitutes a reasonable fee are those contained in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974).⁸¹ Both the House and Senate reports expressed confidence that the application of those standards would "result[] in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys."⁸²

That hope has not been realized. As early as 1977, one commentator noted that "[t]he only truly consistent thread that runs throughout federal court decisions on attorney's fees is their lack of consistency."⁸³ The situation is no better today. Some courts, finding the *Johnson* criteria too subjective and imprecise, have applied different approaches to computing a reasonable fee, most notably the lodestar approach, first articulated in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973) (*Lindy I*), in which a reasonable hourly rate is multiplied by the number of hours reasonably spent to produce a lodestar figure, which may then be adjusted upward and downward depending on additional factors not applied in determining reasonable hours and rates.⁸⁴ Still other courts have adopted a hybrid approach, combining the lodestar method with the *Johnson* criteria.⁸⁵ With different approaches being applied by different circuits and even by various courts within each circuit, parties litigating cases under § 1988 are subject to different approaches and, hence, different results. Courts disagree on what factors should be applied, how they should be applied, and even what they mean. Opposite holdings have been made on virtually every aspect of fee computation.⁸⁶ As a result, in cases decided between 1974 and 1979, hourly rates awarded to civil rights attorneys varied by 685 percent.⁸⁷

As noted by one commentator, the adverse effects of this confusion are several:

First, it inevitably results in unfairness to both attorneys and litigants. . . .

A second consequence of the chaotic state of the law is an excessive amount of litigation concerning the proper fee amount. . . .

A third consequence of the existing state of the law is the arbitrary and haphazard allocation of legal resources. . . .

Finally, the high degree of subjectivity involved in most fee decisions is unhealthy for both the legal profession and for the conduct of litigation. . . .

Although, "[i]deally, . . . litigants will settle the amount of a fee,"⁸⁸ this "ideal" cannot be realized where the parties have no way of estimating how much a court would award in a particular case.

Finally, the most significant adverse effect of the various methods presently employed to calculate the amount of fee awards under the Act is that the awards generated by the application of those methods cannot be characterized as "reasonable," in any conceivable sense of that term. The state of New York, for example, is currently appealing two cases in which the combined fee awards exceed \$2 million. The cumulative effect of such awards on public treasures is devastating. The state of Washington, for example, currently has pending against it over \$8 million in attorney's fees claims. The state of Florida paid nearly \$2.6 million in court-awarded attorney's fees during 1983 alone, and fee awards in recent years in that state have equalled roughly 80 percent of all substantive civil rights judgments against the state. Although the numbers are smaller, the state of Kansas has paid more in attorney's fees awards during the past

three years than it has for all other settlements and judgments of any kind during that same period.

The escalating amount of fee awards has evoked harsh criticism from the judiciary, the press, and the public, as well as from many attorneys. In response to a survey of attorneys and federal judges, conducted by the Federal Judicial Center, 111 of 184 respondents agreed with the statement that "attorneys in class action suits [including civil rights actions] often reap 'windfall profits.'" ⁹¹ Judges also agreed, at a ratio of nearly three to one, that "fee abuses are a serious problem." ⁹² Concluding that "[t]he feeling that attorneys reap exorbitant fees appears to run deep," Professor Arthur Miller noted that "current attempts to reform the fee awards standards may be a logical response to a problem widely thought to exist by the judiciary, and many attorneys, as well as by the press and the public." ⁹³

Since the courts have thus been unable to arrive at consistent and workable standards for computing a "reasonable" fee under the Act, Congress should amend the statute to eliminate the chaos that is undermining its effective implementation. One partial solution that would eliminate much of the confusion and, at the same time, avoid blatantly excessive fees, would be for Congress to set a maximum hourly rate at which counsel may be compensated, as Congress was careful to do in the Equal Access to Justice Act, where the federal treasury was at risk. ⁹⁴ In order to avoid disparate treatment for state and local treasuries, Congress should afford them the same protection. Other specific amendments are recommended later in this report.

Recommendation No. 6: The Congress should amend the Fees Act to provide that the prevailing party shall not be awarded fees in excess of \$75 per hour.

Finding No. 7: Courts routinely make "bonus" awards or apply "multipliers" to the hourly rates set for prevailing counsel, resulting in grossly inflated awards constituting a "windfall" to prevailing counsel.

The awarding of "bonuses" over and above the "lodestar" amount (reasonable number of hours spent times reasonable hourly rate) has become commonplace under § 1988. ⁹⁵ This growing practice has netted spectacular fee awards in many cases, far in excess of the reasonable value of the services rendered. For example, in *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E.D. Pa. 1980), an employment discrimination case, the court increased the basic fee by 50 percent, converting an \$88,450 award into \$132,675 (the total award, including \$6,685 for law student services and \$12,612.50 for preparation and litigation of the fee application, came to over \$151,000). Although the court noted that the legal issues in the case were not particularly novel, it awarded the 50 percent bonus on account of the "excellent quality" of the legal work and the case's advancement of civil rights. ⁹⁶ Similar results were reached in the New York case of *Population Services International v. Carey*, 476 F. Supp. 4 (S.D.N.Y. 1979), in which a bonus of \$23,240 was added to a base award of \$46,760, because the attorneys demonstrated a "high degree of skill and comprehensive research." Presumably counsel's research would have already been reflected in the number of hours billed, and the attorneys' skill would be reflected in their hourly rates, making a further bonus superfluous. In *Vecchione v. Wohlgemuth*, 481 F. Supp. 776 (E.D. Pa. 1979), the court doubled the lodestar amount to account for delay in payment, the quality counsel's work, the case's furtherance of civil rights and defendants'

bad faith. The resulting award exceeded \$207,000. ⁹⁷

The concept of such bonuses or multipliers is nowhere mentioned in the Act. The legislative history, while citing a few cases in which minimal bonuses or multipliers were awarded, ⁹⁸ falls far short of evincing clear Congressional support for the use of bonuses in computing fee awards. Rather, the concept of bonus awards is entirely a judicial creation, conceived in contexts that are entirely inapposite to the application of § 1988.

The concept originated in antitrust cases resulting in the creation of an equitable fund out of which both plaintiffs and their counsel recover. ⁹⁹ In awarding fees in such cases, "the court exercises its equitable jurisdiction over the relationship between an attorney and his amorphous client." ¹⁰⁰ The rationale for fee awards in such cases is one of quantum meruit—"the members of the [benefited] group should pay 'compensation as was reasonable' . . . to the attorney representing their interests." ¹⁰¹ Under that theory, bonus awards make sense and are easily implemented, particularly where the case has created a large monetary fund out of which the award will be paid.

By contrast, fee awards under § 1988 are paid by the defendant in addition to any other judgment against him. Since the defendant is not the one who benefited from the action, the quantum meruit theory cannot be used to justify inflation awards in such cases. Nor can a bonus in such cases be characterized as part of the defendant's equitable "punishment" for legal wrongs against the plaintiffs, since, under § 1988, unlike in the antitrust cases, fees must be paid in addition to the compensatory relief on the merits, rather than out of it. ¹⁰²

An additional significant difference between fee awards in antitrust cases and those in § 1988 actions is that, in the latter, the fee award must be paid by a state or other public entity rather than by a private defendant. The state, unlike a private defendant, is a representative of the public interest; and the taxpayers who ultimately bear the burden of such awards are not guilty of any wrongdoing. Extra caution is therefore warranted in assessing the amount of the award so as not to disrupt state and local governments or unduly reduce the amount of money available for other public purposes. Since the rationales underlying bonus awards have no application in the context of § 1988, the adoption of this mechanism into the calculation of fees under § 1988 is not warranted.

Moreover, bonus awards are entirely inconsistent with the purposes of § 1988. First of all, bonuses are, by definition, "windfalls" to plaintiff's counsel, since bonuses are awarded in addition to "compensation of [plaintiffs] legal expenses," which is all that Congress intended to provide. ¹⁰³ As noted by one court, "multiplying the number of hours properly spent times a reasonable hourly rate is sufficient to serve [the] goal" of attracting competent counsel. ¹⁰⁴ Anything more than that is simply "unearned personal gain at the public expense" ¹⁰⁵ or, in other words, "windfall." ¹⁰⁶

Second, even where some rationale is given for awarding a bonus, the amount of the bonus awarded is entirely arbitrary, ¹⁰⁷ thus violating Congress's mandate that fee awards be "reasonable." Even courts that have endorsed the use of bonuses have commented on the subjectivity of arriving at a precise amount. ¹⁰⁸ As noted by one court, the use of bonuses is an "open-ended device" that "is able to undo in a twinkling . . . all of the careful calculations" involved in setting the lodestar amount. ¹⁰⁹ The arbitrary nature of such awards is exacerbated

by the fact that a difference between a bonus, of, e.g., 10 percent and one 25 percent can result in a difference of hundreds of thousands of dollars in a protracted case.

The lack of consistency and predictability of bonus awards is directly contrary to Congress's purpose of ensuring uniformity and consistency in fee awards. ¹¹⁰ Furthermore, as a practical matter, the unpredictability of bonus awards makes it difficult for the parties to settle fee claims, since the prospect of bonus awards makes it impossible to estimate, with any degree of accuracy, the total amount of fees a court would be likely to award in a particular case. ¹¹¹ Finally, the exorbitant fee awards that result from the use of bonuses certainly cannot be characterized as "reasonable" in amount. ¹¹²

An examination of the justifications offered by courts in support of bonus awards reveals that those justifications are, in fact, fallacious and inconsistent with the overall purposes of the Act. The primary justification used to support bonus awards is that a bonus is necessary to account for the contingent nature of success, often termed the "risk of loss" or the "contingency factor." The roots of this concept can be found in the contingent fee agreements that often obtain between tort plaintiffs and their attorneys. In those circumstances, a contingent fee arrangement has "an economic rationale: it compensates plaintiff's lawyer for his services as an entrepreneur who bears the risks of litigation." ¹¹³ By taking a number of cases on a contingency basis, plaintiff's counsel can use the large fees recovered in successful cases to cover the losses he incurs in unsuccessful ones. Such arrangements thus have the purpose and effect of financing not only meritorious but also losing cases. ¹¹⁴

However, such a purpose and effect are entirely inconsistent with those of Congress in enacting § 1988. Congress intended the Act to encourage and provide compensation only for meritorious cases, ¹¹⁵ certainly not for losing cases, ¹¹⁶ nor even for cases that have a reasonable chance of success but do not ultimately succeed. ¹¹⁷ In fact, Congress intended the Act to deter meritless suits. ¹¹⁸ As the Supreme Court said recently with respect to another fee statute, "One might well imagine the surprise of the legislators who voted for this section as an instrument for deterring meritless suits upon learning that instead it could be employed to fund such suits." ¹¹⁹

As pointed out by one commentator, ignoring the contingency factor is more consistent with Congressional intent: "Putting the lawyer to the risk in close cases helps weed out meritless claims . . . [and] provide[s] a desirable check on the . . . increase in court docket congestion." ¹²⁰ Moreover, "[i]f [unsuccessful] litigation is to be subsidized, one may well ask why the subsidy should come from the defendant in another case." ¹²¹

Contingency bonuses have the further untoward effect of rewarding, and hence encouraging, marginal claims to an even greater extent than clearly successful ones, since the amount of a contingency bonus varies inversely with the strength of plaintiff's claim. ¹²² Awarding bonuses on this basis is patently unfair to defendants, since such award have the converse effect of forcing defendants to pay higher attorney's fees where they had a strong, but ultimately unsuccessful, defense than where violations of plaintiffs' rights were clear from the outset. ¹²³ Such awards cannot serve to deter egregious civil rights violations by potential defendants, one of the subsidiary purposes of the Act, ¹²⁴ since defendants are "penal-

ized" only where it is unclear, prior to litigation, that their conduct is, in fact, illegal.¹²⁸

Finally, to the extent that contingency bonuses are intended to protect plaintiffs' counsel against the risk of nonpayment for their services, such bonuses are particularly inappropriate where plaintiffs are represented by a legal services organization that never receives payment from its clients and whose funding is not contingent on whether it prevails in individual cases. Such attorneys "cannot truly be said to have undertaken a risk of no remuneration."¹²⁹ As aptly stated by one commentator:

"If an organization is not permitted to charge its clients for its services . . . what does that organization risk in undertaking representation in one of the few types of cases which permit recovery of a fee? . . . [L]itigation which permits the collection of a fee by a federally funded legal services organization is actually the most lucrative type of litigation available to such organizations."¹²⁷

Nor can contingency bonuses to legal services attorneys be justified on other grounds. Such bonuses cannot operate as an incentive for such groups to take more civil rights cases,¹²⁸ since an Internal Revenue Service ruling prohibits public interest law firms seeking tax-exempt status from "us[ing] the likelihood or probability of a fee award as a consideration in its selection of cases."¹²⁹ Furthermore, no additional incentive is needed to induce such organizations to take on such cases, since "[t]hese organizations exist to represent groups like the [plaintiff] class, with constitutional claims at the cutting edge of the law."¹³⁰ Nor should contingency bonuses be used as an indirect means of funding legal services organizations.¹³¹ This Act was not intended for that general purpose,¹³² but rather, only to finance *successful civil rights* cases, and there is no guarantee that bonuses received by legal services organizations will be used for that limited purpose. Thus, contingency bonuses to legal service attorneys, which serve none of the purposes of § 1988, must be characterized as impermissible windfalls to such organizations.

Other rationales, in addition to contingency, used by the courts to justify bonus awards include the complexity of the case and the quality of the services provided by plaintiffs' counsel. Since the complexity of the case increases the number of hours reasonably spent, and the quality of representation increases the reasonable hourly rate used to compute the lodestar amount, a bonus supplementing the lodestar based on the factors necessarily constitutes a windfall, which should be disallowed.¹³³

A bonus based on benefits obtained by the plaintiffs in the underlying case is also contrary to the purposes of the Act and unfair to the defendants. The basic fee award is designed to compensate plaintiffs to whatever extent that they prevail.¹³⁴ A party who fully prevails will receive compensation for all time reasonably spent in doing so and, accordingly, will receive a higher fee than one whose success is limited.¹³⁵ An additional bonus for success can only constitute a windfall. Moreover, the amount of a bonus based on results is likely to be arbitrary, particularly in nonmonetary cases where the results are difficult to translate into quantitative terms.¹³⁶ Finally, a court that has just ruled in plaintiff's favor might be inclined to reemphasize the importance of its ruling by rewarding plaintiff again, by way of a bonus, for his "outstanding" success. Such a bonus is unfair to defendants, since they have already "paid" for the results of their wrongdoing via the relief awarded against them on the merits. To "punish" them again by supplementing the

fee award is contrary to the compensatory, nonpunitive purpose of the Act. Eliminating such bonuses would eliminate this subjective element of fee awards.¹³⁷

For all of the reasons discussed above, bonus awards are inconsistent with the purposes of § 1988. Rather than merely compensate plaintiffs' counsel for their legal expenses in prosecuting a particular civil rights case, all that the act intended, bonus awards constitute windfalls to plaintiffs' counsel, a result that Congress expressly intended to avoid. Therefore, Congress should amend the Act to prohibit the use of bonuses or multipliers in computing a fee award.

Recommendation No. 7: The Congress should amend the Fees Act to prohibit the award of bonuses or multipliers in excess of compensation at a reasonable hourly rate for the number of hours reasonably spent by prevailing counsel.

Finding No. 8: In applying the Fees Act to prevailing parties represented by publicly-funded salaried attorneys, courts normally award fees based on hourly rates charged by private counsel, resulting in windfalls that substantially exceed the actual costs of the litigation.

In computing a "reasonable" attorney's fee for prevailing counsel, most courts have applied the market rates charged by private law firms to their fee-paying clients, even where the attorney seeking fees has not actually incurred the high costs ordinarily associated with private practice. For example, in a case now pending before the District Court of Massachusetts, a law professor employed by Harvard University at an annual salary of \$70,000 and having minimal overhead expenses seeks to be compensated at the rate of \$275 per hour (plus a bonus of 50 percent), a rate higher than those charged by even the most high-priced private firms in the area.¹³⁸

In *Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980), attorney's fees were awarded in four civil rights actions in which a non-profit legal aid society, partially funded by the state of Hawaii, represented the prevailing plaintiffs. The Ninth Circuit specifically rejected the argument that the legal aid society should be reimbursed only for its actual costs in litigating the case. Rather, the court concluded that the fee award should be based upon rates charged by private Honolulu attorneys. Similarly, in *Stenson v. Blum*, No. 81-7385 (2d Cir.), cert. granted, 103 S. Ct. 2426 (1983), the Second Circuit affirmed an award of fees to a publicly-funded legal services organization, at the rate of \$95 to \$105 per hour, "the rate[s] charged for similar work by [private] attorneys of like skill in the area." Those cases are not atypical.¹³⁹ However, as a few courts and commentators have recognized, awarding fees to legal services attorneys at "market" rates "constitute[s] a substantial windfall for the organizations involved" and therefore should not be permitted under § 1988.¹⁴⁰

A proper determination of what constitutes a "reasonable" hourly rate for legal services attorneys must begin with an examination of the language of the Act and its legislative history. The Act itself provides some guidance by authorizing the award of "a reasonable attorney's fee as part of the costs." The legislative history also repeatedly equates attorney's fees with the costs of litigation and emphasizes that the Act is intended to reimburse plaintiffs' counsel for the "cost" of vindicating plaintiffs' civil rights in court.¹⁴¹

The legislative history further indicates that the Act was intended primarily to encourage private attorneys to take civil rights cases,¹⁴² although the House Report

indicates, in a footnote, that "a prevailing party is entitled to counsel fees even if represented by an organization."¹⁴³ Thus, the legislative history falls far short of mandating that legal services attorneys be compensated at "market" rates. Moreover, even if Congressional endorsement of the market-rate system could be inferred from the legislative history, the escalating rates that have resulted from its application require a reexamination of that system in light of the overall purposes of § 1988.¹⁴⁴

What the legislative history does unequivocally demonstrate is Congress's intent that, however fees are computed under the Act and to whom they are awarded, the amount of such fees should not be such as to constitute a windfall to prevailing counsel.¹⁴⁵ A close examination of the market-rate system of computing hourly rates for legal services attorneys reveals that it is contrary to that clear legislative intent.

As a few courts and commentators have recognized, assigning "market" rates to legal services attorneys presents difficult, if not insurmountable, problems. First of all, to state the obvious, there is no true "market" for the services of legal services attorneys, since they receive no fees from their clients. Particularly since minimum fee schedules may no longer be used,¹⁴⁶ rates vary widely within communities and even within individual law firms,¹⁴⁷ depending on factors having no necessary relationship with the value of the services rendered or the experience and skill of the attorneys involved, for example, the attorney's relationship with a particular client, what that client can afford to pay, the firm's overhead expenses, and how much profit the firm desires to make.¹⁴⁸ Since such factors are unrelated to the value of a legal services attorney's services in a particular case, assigning such an attorney a rate based on these factors is patently unreasonable and inconsistent with the legislative purpose of compensating civil rights attorneys only for the value of their services in a particular case.

More significant, in light of Congress's clear intent to avoid windfalls, is the fact that rates determined in this manner are likely to far exceed the legal service organizations' actual costs, since such rates are computed on the basis of the high overhead expenses and profit margins of private firms, which are not shared by legal services organizations.¹⁴⁹ Any such excess is obviously a windfall to such organizations.¹⁵⁰ Particularly where the party paying the fee is a state government, "the difference, if any, between the 'market value' fee and the 'compensation' fee would be better spent in remedying [the civil rights] violation that gave rise to the action."¹⁵¹

Although the market-rate system may have been adopted in order to avoid treating legal services organizations any differently from private attorneys,¹⁵² that system, in effect, gives such publicly-funded counsel an unfair advantage over their private counterparts. As noted by one commentator:

"Requiring district courts to award identical gross fees to private and organizational counsel, notwithstanding the greater litigation expenses incurred by private counsel, would effectively award a higher return of profit to organizational counsel. Such a rule would lead a court to arbitrarily increase an otherwise reasonable award of attorney's fees simply because plaintiff's counsel happened to be employed by a legal services organization."¹⁵³

Such disparate treatment is not only unfair to the litigants on both sides of civil rights cases, but is also directly contrary to "the spirit of 'reasonableness' which is the

heart of section 1988. . . . Legal services organizations, along with their counterparts in private practice, are not entitled to anything more than a reasonable fee under section 1988."¹⁵⁴

In order to avoid windfalls to legal services attorneys, a few lower courts have adopted an alternative method of computing hourly rates for legal services organizations, based on the actual litigation expenses of such organizations. Rather than arbitrarily assigning "market" rates to such attorneys, hourly rates are computed according to the hourly wages of the attorneys involved plus the percentage of the annual overhead of the organization attributable to the number of hours reasonably spent by the organization's attorneys on the case.¹⁵⁵

This cost-based method has the advantages of more accurately reflecting the actual costs of vindicating a plaintiff's rights in a particular case, without compensating plaintiff's counsel for overhead and other expenses not actually incurred.¹⁵⁶ Such a system is consistent with the factors enumerated in *Johnson v. Georgia Highway Express* and endorsed by the Congress. An individual attorney's salary presumably reflects his relative skill and experience within the organization.¹⁵⁷ Other pertinent factors, such as the novelty and complexity of the case, would still be reflected in the court's consideration of the number of hours reasonably spent. Moreover, it must be remembered that the *Johnson* criteria were intended only as guidelines and were not meant to be applied so as "to make the prevailing counsel rich."¹⁵⁸

In addition, a cost-based system is actually easier to administer than the more subjective and essentially arbitrary market-rate system.¹⁵⁹ The information needed to compute rates on this basis, i.e., attorneys' salaries and organizational overhead, is readily available, since legal services organizations are required under the Legal Services Corporation Act¹⁶⁰ to report such information as a condition to their receipt of federal funding. By contrast, under the market-rate system, prevailing counsel have the substantial burden of producing detailed and case-specific affidavits from community lawyers of similar experience and other expert testimony in order to establish an appropriate market rate for their services.¹⁶¹ Furthermore, the objectivity of such information will facilitate settlement of fee claims by such organizations.

In sum, a cost-based system for determining reasonable hourly rates for legal services attorneys is consistent with the language and intent of the Act and is certainly preferable to the subjective and inflationary market-rate analysis currently applied by most courts. Under a cost-based system, legal services attorneys would receive full compensation for the cost of vindicating their clients' rights. They should not and cannot reasonably expect to receive more. Accordingly, Congress should amend the Act to provide that fee awards to salaried publicly-funded attorneys be computed on the basis of their actual costs.

Recommendation No. 8: The Congress should amend the Fees Act to provide that, where the prevailing party is represented by a publicly-funded legal services organization, courts should compute a reasonable hourly rate for such counsel based on the actual costs of the litigation to the organization, including the proportion of the attorney's annual salary and of the organization's annual overhead attributable to the number of hours reasonably spent on the case.

Finding No. 9: The Fees Act affects the process of legal dispute resolution in a way

that is unfair to public defendants and that further burdens the courts by:

A. making it more desirable for plaintiffs to commence litigation, rather than settle disputes informally;

B. making it more advantageous for plaintiffs to continue litigation rather than settle where any meritorious claim is presented;

C. making it less desirable, once litigation is underway, for public defendants to alter challenged laws, administrative regulations, or official positions in any way that favors the plaintiffs;

D. making it less desirable for public defendants to litigate those close issues that should be litigated; and

E. making it difficult for plaintiffs and defendants to settle claims for attorney's fees.

Throughout this report, a recurring theme has been the adverse effect of various aspects of the Fees Act, as interpreted and applied by the courts, on the process of settling disputes. Because of the courts' liberal construction of "prevailing party" combined with their rejection of virtually all circumstances justifying the denial of fees, plaintiffs with any colorable claim are encouraged to commence suits, rather than attempt to resolve disputes informally, and to continue to litigate every claim, secure in the prospect of a substantial fee award as long as they prevail on any issue or succeed in obtaining some benefit after the commencement of litigation. Moreover, the longer the litigation continues, the higher the award the plaintiffs can expect to receive.

Conversely, defendants are discouraged from informally resolving disputes for fear that their actions will confer prevailing party status on the plaintiffs, virtually guaranteeing liability for fees. Public defendants are discouraged, however, from litigating cases where they have a strong defense, since in such cases, if plaintiffs ultimately prevail, defendants are forced to pay for both sides of the litigation plus a "contingency bonus" based on plaintiffs' high risk of loss.

Furthermore, because of the absence of uniform standards for calculating a "reasonable" fee award, plaintiffs and defendants have difficulty setting fee claims without litigation. Plaintiffs are further encouraged to litigate their claims for fees, since the cost of fee litigation is also charged to the defendants.

The net result of these incentives and disincentives is to deter plaintiffs from settling meritorious cases but to encourage defendants to settle close cases where they have a strong, but possibly unsuccessful, defense. Many of the foregoing recommendations, if adopted by the Congress, would partially alleviate these skewed and undesirable effects of the Act. However, in order to further encourage settlement, where appropriate, and thereby reduce unnecessary litigation, to the mutual benefit of all parties and the courts, additional reforms are necessary.

In order to encourage pre-litigation settlement, plaintiffs should be precluded from receiving fees where it can be shown that the litigation was commenced primarily for the purpose of obtaining attorney's fees.¹⁶² Such a denial would be warranted where, for example, plaintiffs made no attempt to resolve the dispute informally prior to litigation or filed suit despite defendants' willingness to settle the matter informally.

Once litigation is commenced, settlement could be encouraged by precluding an award of fees to plaintiffs who reject an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure and subsequently obtain a less favorable judgment from the court. Although some courts have construed Rule 68 to require the denial of

attorney's fees in such circumstances,¹⁶³ other courts have disagreed.¹⁶⁴

The denial of fees incurred after the rejection of a settlement offer that turns out to be more favorable than the relief eventually obtained from litigation would "work to further the legitimate concerns of judicial economy and efficiency without discouraging attorneys from pursuing civil rights litigation."¹⁶⁵

Recommendation No. 9: The Congress should amend that Fees Act to provide that the court deny attorney's fees to a prevailing party, where it determines:

A. that the lawsuit was brought principally for the purpose of obtaining attorney's fees; or

B. that the prevailing party rejected an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, or a cognate state rule of procedure, that was more favorable than the relief ultimately granted by the court, in which case no fees shall be awarded for the services rendered after the date of the offer.

CONCLUSION

The Association's recommendations are designed to further the original purposes of the Fees Act while eliminating some of the serious problems that have arisen from its application. In general terms, the major problem with the Act, as presently implemented by the courts, is the lack of uniform and easily applied standards of determining eligibility for fees and for computing the amount of a reasonable fee in particular cases. Absent such standards, state and local governments are faced not only with high and occasionally exorbitant fee awards, but also with the burden and expense of opposing excessive and unjustified claims for fees. Without clear standards, such opposition inevitably takes the form of complex and protracted litigation over fees, which further saps the resources of state and local governments, to the detriment of all parties, the courts, and ultimately, the public, the Act's intended beneficiaries. Legislative reform, along the lines recommended by the Association, is therefore urgently needed.

ABOUT THE ASSOCIATION

The National Association of Attorneys General was founded in 1907 for the purpose of fostering communication of legal developments and cooperative legal actions among the states' chief legal officers and their staff attorneys.

The Association staff compiles and disseminates information on legislative, agency, and judicial developments that have an impact on state legal affairs, and provides research and technical assistance to the offices of Attorneys General. The Association handles hundreds of information requests each month from the offices of Attorneys General, members of Congress, officials of the federal government, and the public. Information clearinghouses are maintained in ten substantive areas: anti-trust, commerce, consumer protection, charitable trusts and solicitations, bankruptcy, criminal justice, corrections, and institutional confinement, energy, environment, and Medicaid fraud. In addition, the Association has been fortunate to obtain under the Intergovernmental Personnel Act (IPA), the services of two senior attorneys from the Department of Justice to assist state Attorneys General in the areas of management and information systems, and Supreme Court advocacy.

The Association operates an extensive continuing legal education program in numerous substantive law areas attended by Attorneys General, Assistant Attorneys

General, and other state and local government officials.

The Association publishes five monthly reports of significant state and federal legal developments and legislative activities, as well as A-G Report, which focuses on the activities and responsibilities of Attorneys General. These publications are available to the bar and the public.

The full Association meets twice yearly, in June and in December, at which time it receives and recommendations from the committees and subcommittees, and thereafter debates, and decides what action the Association shall take on litigation, legislation and policy issues. The autonomy of each Attorney General is carefully protected and the influence of the Attorneys General working within the Association is targeted at those issues on which there is unanimous or nearly support.

The Associations's staff works with numerous committees and subcommittees of the Congress in implementing the Association's policy positions by coordinating testimony of Attorneys General and providing such committees with the views of the Association on particular issues. In addition, we work closely with numerous state, local, and other associations on national issues of mutual concern.

Each spring, Attorneys General meet in Washington, D.C., with the President, Vice President, U.S. Attorney General, and chiefs of the antitrust, civil rights, criminal, and lands and natural resources divisions of the Department of Justice, the Chief Justice of the United States, House and Senate Judiciary Committee chairmen, and other key members of the Administration and Congress.

There are seven former Attorneys General who now serve in the Congress. Senator Jeff Bingaman (D-N.M.) was elected in November 1982 and joins Senators Slade Gorton (R-Wash.), Warren Rudman (R-N.H.), John Danforth (R-Mo.), Thomas Eagleton (D-Mo.), and Robert Stafford (R-Vt.), as well as Rep. Jim Jeffords (R-Vt.).

There are 10 Governors who are former Attorneys General: Governors Richard Bryan (D-Nev.), George Deukmejian (R-Calif.), Toney Anaya (D-N.M.), Mark White (D-Tex.), and Bill Clinton (D-Ark.), William Allain (D-Miss.), William Brennan (R-Me.), Bruce Babbitt (D-Ariz.), Alan Olson (R-N.D.), and William Janklow (R-S.D.).

FOOTNOTES

¹ *Id.* at 269.

² S. Rep. No. 1011, 95th Cong., 2d Sess. 1,4 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 5908.

³ 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney); H.R. Rep. No. 1558, 95th Cong., 2d Sess. 2 (1976).

⁴ 122 Cong. Rec. 33,314 (1976) (remarks of Sen. Abourezk); 35,116 (remarks of Rep. Anderson).

⁵ 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney); 122 Cong. Rec. 31,472, 33,314 (remarks of Sen. Kennedy); 35,115 (remarks of Rep. Anderson); 35,124 (remarks of Rep. Rallsback); 35,126 (remarks of Rep. Fish); 35,127 (remarks of Rep. Holtzman) (1976).

⁶ 122 Cong. Rec. 35,126 (remarks of Rep. Kastemer) (1976).

⁷ *Id.*

⁸ 122 Cong. Rec. 33,314 (remarks of Sen. Kennedy); 35,127 (remarks of Rep. Jordan) ("This is not a food-stamp bill for lawyers. It is not going to work that way."); 35,128 (remarks of Rep. Sieberling) ("not a lawyers' bill") (1976).

⁹ 121 Cong. Rec. 26,806 (1975) (remarks of Sen. Tunney) ("Bill would do nothing to encourage frivolous or bad faith litigation"); 122 Cong. Rec. 35,127 (remarks of Rep. Jordan); 35,128 (remarks of Rep. Sieberling) (1976); H.R. Rep. at 7.

¹⁰ H.R. Rep. at 9; S. Rep. at 6.

¹¹ H.R. Rep. at 6-9; 122 Cong. Rec. 35,155-17 (remarks of Rep. Anderson and Rep. Rallsback); 35,122-23 (remarks of Rep. Sieberling) (1976).

¹² In that case, the Supreme Court construed 42 U.S.C. §§ 1983 and 1988 to apply to actions to en-

force rights secured by any federal statute and ruled that such actions could be brought in state as well as federal courts.

¹³ See *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1944 (1983) (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part) (referring to fees litigation as "one of the least socially productive types of litigation imaginable").

¹⁴ 42 U.S.C.A. § 1988 (West 1981) at 155-305 and (West Supp. 1983) at 13-48.

¹⁵ *Maier v. Gagne*, 448 U.S. 122 (1980); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980); *Hanrahan v. Hampton*, 446 U.S. 754 (1980); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980).

¹⁶ See, e.g., Note, *Awards of Attorney's Fees in the Federal Courts*, 56 St. John's L. Rev. 277 (1982) (citing numerous other articles on the subject); see also Fioretti & Convery, *Attorney's Fees Under the Civil Rights Act—A Time for Change*, 16 J. Mar. L. Rev. 261 (1983).

¹⁷ E. Larson, *Federal Court Awards of Attorney's Fees* (1981); H. Newberg, *Public Interest Practice and Fee Awards* (1981); M. Derfner & A. Wolf, *Court Awarded Attorney Fees* (1983).

¹⁸ *Attorney Fee Awards Reporter* (Harcourt Brace Jovanovich).

¹⁹ L. Cutler, *Foreword to Derfner & Wolf, supra* at vii.

²⁰ *Mills v. Eltra Corp.*, 663 F.2d 760, 761 (7th Cir. 1981) (186 hours devoted to case on the merits and over 350 hours on the fee portion).

²¹ *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1941 (1983).

²² *Id.* at 1944 (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part, dissenting in part).

²³ *Id.* at 1950-51.

²⁴ Compare, e.g., *New York Association for Retarded Citizens v. Carey*, 711 F.2d 1136 (2d Cir. 1983) with *Stenson v. Blum*, No. 81-7385 (2d Cir. 1982), cert. granted, 103 S. Ct. 2426 (1983); compare also *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982), with *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42 (D.C. Cir. 1982), and *Jordan v. United States Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982).

²⁵ 82 *Shepard's United States Citations* (Supp. No. 6) at 308 and (Supp. No. 7) at 96.

²⁶ See floor debates and House and Senate reports cited in introduction, *supra*.

²⁷ See *Maine v. Thiboutot*, 448 U.S. 1, 25-26 (1980) (Powell, J., dissenting); Comment, *The Scope of the Civil Rights Attorney's Fees Awards Act After Maine v. Thiboutot*, *Maier v. Gagne*, and *Supreme Court of Virginia v. Consumers Union*, 66 Iowa L. Rev. 1301, 1311-13 (1981); Case Comment, *Statutory Non-Civil Rights Violations of Section 1983 and Awards of Attorney's Fees After Maine v. Thiboutot*, 61 B.U.L. Rev. 1069, 1086-89 (1981).

²⁸ *Id.* at 4-9.

²⁹ *Id.* at 8.

³⁰ *Id.* at 22, 24.

³¹ *Id.* at 24.

³² *Stratos v. Department of Public Welfare*, 387 Mass. 312 (1982). Although the court viewed the claim as "substantial" under the "painstakingly minimal standard of substantiality defined in *Hagan v. Lavine*," *id.* at 319, it expressed doubt that plaintiff could have actually prevailed on his equal protection claim, given the minimal level of scrutiny applicable to classifications drawn by law or government practice where, as here, no suspect classification or fundamental right is involved. *Id.* at 318.

³³ H.R. Rep. at 4 n. 7. It should be noted that the test of "substantiality" articulated in *Hagan* was developed for purposes of federal jurisdiction and is therefore ill-suited to determining whether a party has prevailed on the merits. See M. Derfner & A. Wolf, *Court Awarded Attorney Fees*, § 12.01 (1983).

³⁴ *Hagan v. Lavine*, *supra* at 536-43; see *Stratos*, *supra* at 319.

³⁵ *Id.* at 564.

³⁶ See M. Derfner & A. Wolf, *Court Awarded Attorney Fees* § 12.01-03 (1983).

³⁷ See 122 Cong. Rec. 35,122 (1976) (remarks of Rep. Drinan, sponsor) (Act passed to encourage enforcement of civil rights by "private attorney[s] general" advancing the rights of the public at large, and not merely some narrow parochial interest").

³⁸ *Id.* at 1187.

³⁹ *Id.* at 1187-88.

⁴⁰ *Id.* at 108 (emphasis omitted).

⁴¹ See also *Armstrong v. Reed*, 462 F. Supp. 496 (N.D. Miss. 1978) (where state statute was amended while case was pending, judgment entered in state defendants' favor, but fees awarded to plaintiffs

since they "accomplished their goal"); *Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982) (the First Circuit reversed the district court's denial of fees and awarded approximately \$15,000 to the plaintiffs, based on their "success" in obtaining a short injunction pending appeal of a lower court denial of a requested preliminary injunction, even though the actual benefits, appropriation of welfare funds were conferred by the state legislature, not by the defendants or the court, even before the injunction went into effect).

⁴² *Cicero v. Olgiati*, 473 F. Supp. 653, 655 (S.D. N.Y. 1979).

⁴³ M. Derfner & A. Wolf, *Court Awarded Attorney Fees* 19.02 (1983).

⁴⁴ *Bly v. McLeod*, 605 F.2d 134, 138 n. 6 (4th Cir. 1979), cert. denied, 445 U.S. 928 (1980).

⁴⁵ *Kenley v. Young*, 455 U.S. 961 (1982).

⁴⁶ *Id.* at 967.

⁴⁷ See, e.g., H.R. Rep. at 6-7. Compare, *Vermont Low Income Advocacy Council, Inc. v. Usery*, 546 F.2d 569, 36 A.L.R. Fed. 519 (2nd Cir. 1976), applying stricter test under attorney's fees provision of the Freedom of Information Act (FOIA), 5 U.S.C. § 522 (a)(4)(E) under which "court may assess against the United States reasonable attorneys fees . . . in any case . . . in which the complainant has substantially prevailed".

⁴⁸ 519 F. Supp. 309 (N.D. Ill. 1981).

⁴⁹ Fioretti & Convery, *Attorney's Fees Under the Civil Rights Act—A Time for Change*, 16 J. Mar. L. Rev. 261, 278 (1983).

⁵⁰ *Id.*

⁵¹ *Id.* at 1940.

⁵² *Id.*

⁵³ *Id.* at 1939.

⁵⁴ See *id.* at 1950 (Brennan, J., concurring in part and dissenting in part).

⁵⁵ *Id.* at 1951.

⁵⁶ See 82 *Shepard's United States Citations* (Supp. No. 6) at 308 (Supp. No. 7) at 96.

⁵⁷ See H.R. Rep. at 8. Approximately half of the federal fee-shifting statutes are mandatory. M. Derfner & A. Wolf, *Court Awarded Attorney Fees* § 5.02 [2] (1983); see, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b); Truth in Lending Act, 15 U.S.C. §§ 1640(a), 1667b(a), 1667d(a), 1681n, 1681o, 1961(d); Civil Service Reform Act of 1978, 5 U.S.C. § 5596(b)(1)(A)(ii); Right to Financial Privacy Act of 1978, 12 U.S.C. § 3417(a)(4).

⁵⁸ Derfner & Wolf, *supra* at § 10.01 (emphasis added). See, e.g., *Hutchinson v. William C. Barry, Inc.*, 50 F. Supp. 292, 298 (D. Mass. 1943).

⁵⁹ Derfner & Wolf, *supra* at § 10.01.

⁶⁰ *Id.* (emphasis added).

⁶¹ 122 Cong. Rec. 31,471 (1976) (remarks of Sen. Mathias). See also 122 Cong. Rec. 31,472 (remarks of Sen. Kennedy); 35,118, 35,128 (remarks of Rep. Sieberling); 35,126 (remarks of Rep. Fish) (1976); H.R. Rep. at 1, 2-3, 6; S. Rep. at 2, 3, 6.

⁶² Compare, e.g., the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d)(2), which provides as follows:

"If a consumer finally prevails . . . he may be allowed by the court to recover . . . attorney's fees . . . unless the court in its discretion shall determine that such an award of attorney's fees would be inappropriate."

⁶³ Fioretti & Convery, *Attorney's Fees Under the Civil Rights Act—A Time for Change*, 16 J. Mar. L. Rev. 276 (1983).

⁶⁴ Derfner & Wolf, *supra*, at § 10.02[3] (1983); Fioretti & Convery, *supra* at 276; *Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act: What Special Circumstances Render an Award Unjust?*, 51 Fordham L. Rev. 320 (1982).

⁶⁵ See, e.g., *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 739 (1980); *Hutto v. Finney*, 437 U.S. 678, 693 (1978); *Nadeau v. Helgemoe*, 581 F.2d 275, 280 (1st Cir. 1978); *Holley v. Lavine*, 605 F.2d 638, 646 (2d Cir. 1979), cert. denied, 446 U.S. 913 (1980); *Bills v. Hodges*, 628 F.2d 844, 847, (4th Cir. 1980); *Elwest Stereo Theatre, Inc. v. Jackson*, 653 F.2d 954, 956 (5th Cir. 1981); *Haycraft v. Holtenbach*, 606 F.2d 128, 132 (6th Cir. 1979); *Bond v. Stanton*, 630 F.2d 1231, 1234 (7th Cir. 1980); *Pickett v. Milam*, 579 F.2d 1118, 1121 (8th Cir. 1978); *Seattle School District No. 1 v. Washington*, 633 F.2d 1338, 1349 (9th Cir. 1980), aff'd, 102 S. Ct. 3187 (1982); *Love v. Mayor*, 620 F.2d 235, 236 (10th Cir. 1980).

⁶⁶ See, e.g., *Crosby v. Bowling*, 683 F.2d 1068, 1072-73 (7th Cir. 1982); *Johnson v. Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979).

⁶⁷ See, e.g., *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982).

⁶⁸ See, e.g., *Elwest Stereo Theatre, Inc. v. Jackson*, *supra* at 956.

⁶⁹ See, e.g., *Skoda v. Fontani*, 646 F.2d 1193 (7th Cir. 1981).

⁷⁰ See, e.g., *Morrison v. Ayoob*, 627 F.2d 669, 673 (3rd Cir. 1980), cert. denied, 449 U.S. 1102 (1981).

⁷¹ See, e.g., *Entertainment Concepts, Inc. v. Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981).

⁷² See, e.g., *Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980).

⁷³ See, e.g., *Concerned Democrats v. Reno*, 689 F.2d 1211 (5th Cir.), rev'd 493 F. Supp. 660 (S.D. Fla. 1980).

⁷⁴ *Price v. Felka*, 690 F.2d 98 (6th Cir. 1982).

⁷⁵ *Connor v. Winter*, 519 F. Supp. 1337, 1348 (S.D. Miss. 1981) (Cox, J., dissenting).

⁷⁶ *Pioretto & Convery*, supra at 277.

⁷⁷ *Id.*

⁷⁸ *Pioretto & Convery*, supra at 277.

⁷⁹ 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412 (d)(1)(A). Congress created this exception as a "safety valve" to preclude fee awards when the federal government "advanced in good faith the novel but credible extension and interpretations of the law (that often underlie vigorous enforcement efforts)." S. Rep. No. 253, 96th Cong., 2d Sess. 7 (1980). See also, *Vermont Low Income Advocacy Council, Inc. v. Usery*, supra, at 36 ALR F. at 525, 526. (FOIA attorney's fees would not be awarded if the government's withholding of information "had a reasonable basis in law").

⁸⁰ See Pub. L. No. 96-481, § 201. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5 (1980). Reprinted in 1980 U.S. Code Cong. & Ad. News 4984 (purpose of Act is to remove the financial deterrent to litigation against the United States).

⁸¹ S. Rep. at 5; H.R. Rep. at 8-9. The twelve Johnson factors, similar to those contained in the American Bar Association's Code of Professional Responsibility, are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the attorney's customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

⁸² S. Rep. at 5; see also H.R. Rep. at 8-9.

⁸³ *Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 283-93 (1977).

⁸⁴ See, e.g., *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980); *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*Copeland III*).

⁸⁵ See, e.g., *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982); *Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1981); *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137 (8th Cir. 1982).

⁸⁶ M. Derfner & A. Wolf, *Court Awarded Attorneys' Fees* § 16.01 (1983).

⁸⁷ Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 378 (1980).

⁸⁸ West's annotations to 42 U.S.C.A. § 1988, concerning guidelines and determinations of a "reasonable" fee, now fill 44 closely printed pages. 42 U.S.C.A. § 1988 (West 1981) at 221-58, (West Sup. 1983) at 29-39.

⁸⁹ *Berger*, supra at 283-93.

⁹⁰ *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1941 (1983).

⁹¹ A. Miller, *Attorney's Fees in Class Actions* (Federal Judicial Center 1980) at 300.

⁹² *Id.* at 306.

⁹³ *Id.* at 301.

⁹⁴ 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A) (setting a maximum hourly rate of \$75). The Association is sensitive to inflation's effect on the adequacy of an hourly rate and suggests that this should be adjusted periodically.

⁹⁵ *Leubsdorf, The Contingency Factor in Attorney Fee Awards*, 90 Yale L.J. 473 (1981).

⁹⁶ *Id.* at 965-86. Presumably the purpose of any fee award under § 1988 is the advancement of civil rights.

⁹⁷ *Id.* at 795-800. See also, e.g., *Stenson v. Blum*, No. 81-7385 (2d Cir. 1983), cert. granted, 103 S. Ct. 2426 (1983) (affirming 50 percent bonus); *Graves v. Barnes*, 700 F.2d 220 (5th Cir. 1983) (approving multiplier of 2); *Louisville Black Police Officers Organization, Inc. v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983) (approving 33-1/3 percent enhancement); *Manhart v. City of Los Angeles*, 652 F.2d 904 (9th Cir. 1981); vacated and remanded on other

grounds, 103 S. Ct. 2420 (1983) (approving increments of 75 and 30 percent); *Rafender v. University of Minnesota*, 546 F. Supp. 158 (D. Minn. 1982) (multiplier of 3); *Wells v. Hutchinson*, 499 F. Supp. 174 (E.D. Tex. 1980) (multiplier of 2); *West v. Redman*, 530 F. Supp. 546 (D. Del. 1982) (multiplier of 1.75).

⁹⁸ S. Rep. at 8. Those cases were cited as examples of the application of the proper criteria for determining a reasonable fee. Congress nowhere expressly endorsed or even mentioned the use of bonuses.

⁹⁹ See, e.g., *Lindy I*, 487 F.2d 161 (3rd Cir. 1973); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3rd Cir. 1976) (*Lindy II*); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974).

¹⁰⁰ *Prandini v. National Tea Co.*, 557 F.2d 1015, 1020 (3rd Cir. 1977).

¹⁰¹ *City of Detroit v. Grinnell*, supra at 469; *Lindy I*, supra at 165.

¹⁰² See *Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. Pa. L. Rev. 281, 317-18 (1977); see also *Hutto v. Finney*, 437 U.S. 678, 695 (1978) (fee award under § 1988 not intended to "compensate the plaintiff for the injury that first brought him into court").

¹⁰³ See S. Rep. at 6 ("counsel . . . should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter'").

¹⁰⁴ *Oliver v. Kalamazoo Board of Education*, 576 F.2d 714, 716 (6th Cir. 1978).

¹⁰⁵ *Northcross v. Board of Education*, 611 F.2d 624, 638 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

¹⁰⁶ *Id.*; see also *Berger*, supra at 292, 317-18, 324 n. 167; *Rowe, The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L. J. 651, 675.

¹⁰⁷ See *Berger*, supra at 290.

¹⁰⁸ See, e.g., *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1382 (D.C. Cir. 1982) (amount of bonus "inherently imprecise"); *Foster v. Gloucester County Board of Chosen Freeholders*, 465 F. Supp. 293, 302 (D. N.J. 1978). See also M. Derfner & A. Wolf, *Court Awarded Attorneys' Fees* § 16.05(1) (1983).

¹⁰⁹ *Swicker v. William Armstrong & Sons, Inc.*, 484 F. Supp. 762, 777 (E.D. Pa. 1980).

¹¹⁰ See 122 Cong. Rec. 35,118, 35,122 (1976) (remarks of Rep. Sieberling); H.R. Rep. at 1.

¹¹¹ For example, in *Brewster v. Dukakis*, 544 F. Supp. 1069 (D. Mass. 1982), plaintiff's counsel sought fees of \$1.2 million, including a 100 percent bonus. Following litigation of the fee claim, the district court awarded \$386,204, including a 10 percent bonus. If bonuses were not available, the gulf between what plaintiffs were seeking and what defendants were willing to pay would have been much narrower and settlement much more likely.

¹¹² The size of such awards has brought harsh criticism from members of the public as well as the bench and bar. See *Berger*, supra at 292 and n. 55; *Alpine Pharmacy, Inc. v. Charles Pfizer & Co.*, 481 F.2d 1045, 1050, (2d Cir.), cert. denied, 414 U.S. 1092 (1973) ("lucrative fees involved in recent class actions may evoke public acceptance of an Italian proverb. 'A lawsuit is a fruit tree planted in a lawyer's garden'").

¹¹³ *Leubsdorf*, supra at 480.

¹¹⁴ *Copeland III*, 641 F.2d 880, 913 (D.C. Cir. 1980) (Wilkey, J. dissenting); *Leubsdorf*, supra at 474 ("The current theory of contingency bonuses implies that lawyers and clients should be made as willing to bring a feeble suit as a promising one"; *id.* at 491-92).

¹¹⁵ 122 Cong. Rec. 35,118 (remarks of Rep. Sieberling) ("provide for . . . compensation . . . in meritorious cases"), 35,127 (remarks of Rep. Jordan) ("access to the system of justice to everyone . . . if he does, in fact, have a meritorious claim"), 35,128 (remarks of Rep. Sieberling) ("meritorious . . . deserving cases") (1976).

¹¹⁶ 121 Cong. Rec. 26,808 (1975) (remarks of Sen. Tunney) ("act would do nothing to encourage frivolous litigation").

¹¹⁷ *Furtado v. Bishop*, 84 F.R.D. 671, 677 (D. Mass. 1979) ("There must be an element of reason; the fee must not be such as to encourage the overpressing of marginal claims"), rev'd, 635 F.2d 915 (1st Cir. 1980); H.R. Rep. at 6-8.

¹¹⁸ S. Rep. at 5; *Christanburg Garment Co. v. EEOC*, 434 U.S. 412, 419-20 (1978).

¹¹⁹ *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274, n. 6 (1983).

¹²⁰ Note, *Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act*, 80 Colum. L. Rev. 346, 375 (1980).

¹²¹ *Leubsdorf*, supra at 488-89.

¹²² See, e.g., *City of Detroit v. Grinnell Corp.*, supra at 471 ("[t]he greater the probability of

success . . . the less this consideration should serve to amplify the basic . . . fee"); *Prandini v. National Tea Co.*, supra at 1020.

¹²³ *Leubsdorf*, supra at 488-89.

¹²⁴ See, e.g., 122 Cong. Rec. 31,471 (1976) (statement of Sen. Scott) (Act will help eradicate discrimination); S. Rep. at 5 ("fee awards . . . secure[ly] compliance with [civil rights] laws"); *Copeland III*, supra at 988.

¹²⁵ *Rowe*, supra at 656, 676, n. 115; *Leubsdorf*, supra at 490; Note, *Promoting the Vindication of Civil Rights Through the Attorneys' Fees Awards Act*, supra at 375; *Hughes v. Repko*, 578 F.2d 483, 491 (3rd Cir. 1978) (Garth, J. concurring).

¹²⁶ *Vecchione v. Wohlgenuth*, supra at 795.

¹²⁷ Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under the Attorneys' Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 369-70 and n. 189 (1980). See also *Rowe*, supra at 670.

¹²⁸ *Cf. Rodriguez v. Taylor*, 569 F.2d 1231, 1245, (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978).

¹²⁹ Rev. Proc. 75-13; § 3, 1975-1 Cu. Bull. 662.

¹³⁰ *NYSARC v. Carey*, 711 F.2d 1136, 1154 (2d Cir. 1983).

¹³¹ Compare *Copeland III*, supra at 899 with *id.* at 920 n. 32 (dissent).

¹³² See Comment, *Calculation of a Reasonable Award of Attorneys' Fees*, supra at 362-63, 395.

¹³³ See *Leubsdorf*, supra at 487; *Berger*, supra at 317-38.

¹³⁴ See *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1940 (1983).

¹³⁵ *Id.*

¹³⁶ *Berger*, supra at 316.

¹³⁷ *Id.* The purpose of this and other recommendations contained in this report is to make the process of awarding fees more objective. If these recommendations are implemented, courts would be liberated from engaging in this unnecessarily subjective process, since more claims for fees could be settled and those that reached the courts could be resolved by the application of objective and easily applied criteria.

¹³⁸ *Grendel's Den v. Larkin*, No. 77-3418-T (D. Mass.). See also *Johnson v. Snyder*, 470 F. Supp. 972 (N.D. Ohio 1979); *Pugh v. Rainwater*, 465 F. Supp. 41 (S.D. Fla. 1979); *Pennsylvania v. O'Neill*, 431 F. Supp. 700 (E.D. Pa. 1977), *aff'd mem.* 573 F.2d 1301 (3rd Cir. 1978) (fees awarded to law professors at "market" rates).

¹³⁹ See also, e.g., *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978); *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978).

¹⁴⁰ *NYSARC v. Carey*, 711 F.2d 1136 (2d Cir. 1983). See also *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983); *Copeland III*, 641 F.2d 880 (D.C. Cir. 1980) (Wilkey, J. dissenting); *Copeland v. Marshall*, 594 F.2d 244 (D.C. Cir. 1978) (*Copeland II*); *Greenspan v. Automobile Club*, 536 F. Supp. 411 (E.D. Mich. 1982); *Glover v. Johnson*, 531 F. Supp. 1036, 1039-44 (E.D. Mich. 1982); *Page v. Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979); *Alsager v. District Court*, 447 F. Supp. 572, 577-80 (S.D. 1977); Comment, *Calculation of a Reasonable Award of Attorneys' Fees Under Attorneys' Fees Awards Act of 1976*, 13 J. Mar. L. Rev. 331, 378-400 (1980).

¹⁴¹ 122 Cong. Rec. 31,471 (remarks of Sen. Mathias), 31,472 (remarks of Sen. Kennedy), 35,118 (remarks of Rep. Sieberling), 35,126 (remarks of Rep. Fish) (1976); H.R. Rep. at 1, 2-3, 6; S. Rep. at 2, 3, 6. See also *Alsager v. District Court*, supra at 577 ("Nothing . . . indicates that the purpose of the statute was other than reimbursement for costs and time spent."); *Page v. Preisser*, supra at 402-03.

¹⁴² See H.R. Rep. at 2-3.

¹⁴³ H.R. Rep. at 8 n. 16.

¹⁴⁴ See *Copeland III*, supra at 908, 910 (dissent) ("path of attorney's fees [under market-rate system] . . . is Up, Up, and Away! . . . [S]pecific situations which arise in future cases will sometimes bring to light deficiencies in the general rules laid down in the past . . .").

¹⁴⁵ See H.R. Rep. at 9; S. Rep. at 6.

¹⁴⁶ *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

¹⁴⁷ See *Copeland III*, supra at 910 n. 3, 924 (dissent) ("going hourly rate" . . . is itself an artificial construct").

¹⁴⁸ Comment, *Calculation of a Reasonable Award of Attorneys' Fees*, supra at 385; *Copeland III*, supra at 914, 924-25 (dissent).

¹⁴⁹ See *NYSARC v. Carey*, supra at 1150.

¹⁵⁰ Such a windfall cannot be justified as enabling legal services organizations to undertake other civil rights cases. *Cf. Palmigiano v. Garrahy*, 616 F.2d 598, 602 (1st Cir.), cert. denied, 449 U.S. 839 (1980); *Copeland III*, supra at 899, since the Act was not intended to serve that purpose, however benevolent.

¹⁵¹ *Glover v. Johnson*, supra at 1044.

¹³² See, e.g., *Palmigiano v. Garrahy*, supra at 601.
¹³³ Comment, *Calculation of a Reasonable Award of Attorney's Fees*, supra at 398.

¹³⁴ Id. at 395.

¹³⁵ See *NYSARC v. Carey*, supra at 1150-52; *Glover v. Johnson*, supra at 1044; *Alsager v. District Court*, supra at 578; *Page v. Preisser*, supra at 402.

¹³⁶ See *Page v. Preisser*, supra at 401.

¹³⁷ *Rodriguez v. Taylor*, supra at 1248.

¹³⁸ *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719 (5th Cir. 1974).

¹³⁹ See *Copeland III*, supra at 925-28 (dissent).

¹⁴⁰ 42 U.S.C. § 2996h(c)(1); 45 C.F.R. § 1602.

¹⁴¹ See *Berger*, supra at 324; Comment, *Calculation of a Reasonable Award of Attorney's Fees*, supra at 385; *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982) ("Settling a prevailing hourly rate has proven more difficult than perhaps may have been contemplated.")

¹⁴² Cf., e.g., 42 U.S.C. § 3612(c), precluding an award of fees which the lawsuit is "brought principally for the purpose of gaining attorney fees."

¹⁴³ See, e.g., *Fulps v. City of Springfield*, 715 F.2d 1088, 1092 (6th Cir. 1983); *Walters v. Heublein, Inc.*, 485 F. Supp. 110, 113 (N.D. Cal. 1979); *Jones v. Federated Department Stores, Inc.*, 527 F. Supp. 912, 920-21 (S.D. Ohio 1981); *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978). See also, Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 899-90. A proposed amendment to Rule 68 is presently being considered, which would expressly provide that fees should be denied in such circumstances. 98 F.R.D. 361-67 (1983).

¹⁴⁴ See, e.g., *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983); *Greenwood v. Stevenson*, 88 F.R.D. 225 (D. R.I. 1980).

¹⁴⁵ *Walters v. Heublein, Inc.*, supra at 114-15; see also Committee Note to Preliminary Draft of Proposed Amendment to Rule 68, 98 F.R.D. at 366 (1983).

[From the Washington Post, Dec. 16, 1983] ATTORNEY'S FEES

Professor Laurence Tribe of Harvard Law School won a big constitutional case against the Commonwealth of Massachusetts and is therefore, by federal statute, allowed to collect "reasonable" attorney's fees from the loser. But the state is refusing to pay his \$332,000 bill, which is based in part on an hourly rate of \$275. No wonder. That's a pretty hefty fee for a moonlighting academic who wins a liquor license case. Yes, a liquor license.

Prof. Tribe, with two assistants, represented a restaurant in challenging a state statute that granted churches and schools a veto power over liquor license applications by nearby businesses. After three years he won decisively in the Supreme Court, arguing that this delegation of a governmental licensing decision to a private party, particularly a religious organization, violated due process and the establishment clause of the First Amendment. Under a 1976 federal statute, attorneys who win constitutional and civil rights cases against governments can request the court to make the losing defendant pay "reasonable" attorney's fees. The purpose is to promote vindication of those rights.

Prof. Tribe can command high fees from his paying clients (many are not) because he is an eminent constitutional scholar and a highly creative and successful advocate. Billing \$275 per hour, he argues, is consistent with top wages in Boston law firms, is much less than in the priciest New York or Washington firms, and is much less than he himself has charged some affluent clients. Prof. Tribe also argues that the 50 percent "tip" he applied to the itemized bill is both legal and perfectly reasonable given the complexity of the constitutional theories involved, the risk of losing and the time he's waited to receive any compensation at all.

That's beside the point. High-priced lawyers are just charging much too much—to the point of caricature—and the folks expected to pay their fees should put an end to the practice. Just because well-heeled pri-

vate clients dole out huge sums doesn't mean that the public should be equally generous. The "prevailing wage" approach that government uses when it is buying services—which is the essence of Prof. Tribe's claim—has a superficial appeal. But on closer inspection it reveals elements of a gigantic rip-off.

Public works cost too much in part because the Davis-Bacon Act effectively requires union-scale wages. Medical costs soar in part because doctors have dominated service and price decisions. There's news every week of some windfall for a government consultant or defense contractor. For all these groups, government should refuse to bolster inflated wages and profits. Sorry, Prof. Tribe. Lawyers—even civil rights lawyers—need at least as much wage restraint as others when it comes to billing the government.

Mr. DENTON. Mr. President, I am pleased to join my distinguished colleague, Mr. THURMOND as a cosponsor of the Legal Fees Equity Act. The bill would establish standards and procedures for awards of attorneys' fees in civil judicial and administrative proceedings against the United States, States, and local governments in cases where Federal statutes allow such awards, and eliminates excessive awards in such cases. This bill specifically includes fee awards to subjects of investigations under the Independent Counsel Statute, 28 U.S.C. 593(g), and also expands the authority of the Attorney General over the hiring of outside counsel by Federal agencies for litigation. The intent of the bill is to achieve a more equitable balance in compensation among the various attorneys litigating for or against the government and private attorneys receiving fees under civil fee-shifting statutes.

Mr. President, a number of Federal statutes provide that parties to civil suits and administrative proceedings against the United States, States, or local governments may, under appropriate circumstances, recover "reasonable attorneys' fees" from the government defendants. These statutes have, however, placed a great burden on the courts due to the lack of congressional guidance as to when an award of attorneys' fees is appropriate, or as to what constitutes a reasonable award. As a result, courts have reached conflicting interpretations of the civil fee-shifting statutes. In some cases the courts have used "multipliers" and "bonuses" to double, and even triple, the normal hourly rates of the prevailing party's attorney. Attorneys' fee in excess of \$100 an hour are common, with some requests exceeding \$400 an hour.

The Legal Fees Equity Act will provide the much-needed guidance to the courts and Federal agencies for the award of attorneys' fees pursuant to Federal statutes thereby reducing the current uncertainties and disparities reflected in present decisions.

Specifically, the bill will:

Set a \$75 per hour maximum rate for attorney's fees awarded, and eliminate the use of bonuses and multipliers to escalate fee awards. This will compen-

sate "private attorneys' general" at a level commensurate with—but still significantly higher than—that of their government counterparts, but provide a reasonable incentive sufficient to attract competent counsel;

Allow recovery of attorney's fees only when a party has prevailed on the merits of its complaint, or where the suit is concluded by a favorable settlement agreement;

Allow recovery of attorneys' fees only for work performed on issues on which the party prevailed;

Permit the reduction or denial of the amount of fee awards, for example, where a party has unreasonably protracted the litigation; where the services provided were excessive with regard to the nature of the controversy; or where the fee award would unreasonably exceed the hourly salary of a salaried attorney;

Provide that monetary judgments be reduced—but not more than 25 percent—by the amount of the attorneys' fees allowed in the proceeding. Exceptions are allowed for suits under certain provisions of the Equal Access to Justice Act, suits for recovery of disputed taxes, or in cases of undue hardship;

Establish certain procedural requirements for attorneys' fee applications, including a 30-day time limit after final judgment for submitting fee applications, and require courts and agencies to develop additional guidelines;

Clarify the circumstances in which attorneys' fees may be awarded when a claim becomes moot or the party refuses to accept a reasonable settlement offer;

Amend the Independent Counsel Statute (28 U.S.C. 593(g)), to impose the same \$75 per hour limitation upon any fee awarded to a subject of an investigation under the statute; and

Impose a \$75 per hour limit upon the amounts payable to outside private counsel retained by any Federal agency for litigation where the taxpayer must foot the bill.

Mr. President, I welcome the guidance and reform which the Legal Fees Equity Act offers. I urge my colleagues to join me in cosponsoring the bill.

By Mr. THURMOND (for himself and Mr. MATHIAS) (by request):

S. 1581. A bill to amend section 3006A of title 18, United States Code, to improve the delivery of legal services in the criminal justice system to those persons financially unable to obtain adequate representation, and for other purposes; to the Committee on the Judiciary.

CRIMINAL JUSTICE ACT REVISION

● Mr. THURMOND. Mr. President, I rise today to introduce the proposed "Criminal Justice Act Revision of 1985" at the request of the Judicial Conference of the United States.